



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

LIMITATION OF ACTIONS

(LRC CP 54 – 2009)



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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 140 documents containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. After the Commission took over responsibility for this important resource, it decided to change the name to Legislation Directory to indicate its function more clearly.

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Full responsibility for this publication lies, however, with the Commission.

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Tuohy v Courtney	[1994] 3 IR 1	Ireland
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INTRODUCTION

A Background to the Project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ and involves a general examination of limitation periods in civil actions, many of which are contained in the *Statute of Limitations 1957* (as amended).

2. The Commission has previously addressed specific aspects of limitation periods in civil actions, including in its 1987 *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries*.² The issue was also addressed in the Commission's 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law*.³ Many of the Commission's recommendations have been implemented by the Oireachtas, notably in the *Statute of Limitations (Amendment) Act 1991* (claims relating to latent personal injuries) and the *Land and Conveyancing Law Reform Act 2009* (land-related claims).

3. Given the practical importance of limitation periods to civil proceedings, the Commission decided that it was appropriate to include a general review of this area in the *Third Programme of Law Reform 2008-2014*. This Consultation Paper builds on and in many instances incorporates the

¹ Law Reform Commission, *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 4.

² *Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries* (LRC 21-1987). The Commission also examined the area in: *Report on the Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001); *Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC CP 16-2000); *Consultation Paper on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injuries)* (LRC CP 13-1998); *Report on Defective Premises* (LRC 3-1982); and *Working Paper on the Law relating to the Liability of Builders, Vendors, and Lessors for the Quality and Fitness of Premises* (LRC WP 1 – 1977).

³ LRC 74-2005, at 322-339, which followed from the *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (CP 34-2004). See also *Report on Title to Adverse Possession of Land* (LRC 67-2002).

proposals made in the Commission's previous publications on this subject in order to provide a general frame of reference for the future.⁴

B The meaning of "Limitation of Actions"

4. The law concerning "limitation of actions" refers to the system of rules that limits the period of time available to a person ("the plaintiff") to initiate a civil claim (also known as an "action") against another person ("the defendant").

5. This system of rules allows the plaintiff a specific amount of time, running from a specified date, within which to bring an action against the defendant. If the plaintiff fails to commence proceedings within the time allowed, the defendant has a defence to the plaintiff's claim and may argue that the plaintiff is out of time ("statute-barred"). The defendant must then establish to the court that the plaintiff commenced proceeding outside the time period allowed. If the defendant satisfies the court that the plaintiff is statute-barred, the defendant has immunity from liability, regardless of whether the plaintiff's claim was well founded.

6. The "commencement of proceedings" is achieved by issuing an originating document in the appropriate court office. Once the plaintiff commences proceedings, the limitation clock stops running. The plaintiff need not serve the originating document on the defendant in order for the clock to be stopped; once the document is issued, the clock stops running.⁵

C The Statute of Limitations and other legislation on limitation periods

7. The law on limitation of actions in Ireland is most visibly governed by the *Statute of Limitations 1957*, as amended in particular by the *Statute of*

⁴ The Commission has also had the benefit of the analysis in Brady & Kerr *The Limitation of Actions* 2nd ed (Round Hall, 1994) and McMahon and Binchy, *Law of Torts* 3rd ed (Tottel, 2000).

⁵ Under Order 8, rule 1 of the *Rules of the Superior Courts 1986*, which applies to High Court proceedings, the plaintiff is allowed 12 months from the date of issue of the originating document before he or she is obliged to serve that document on the defendant. If the 12 month period is about to expire and the originating document has not yet been served, the plaintiff may apply to the court for permission to renew the summons for a further six month period. Alternatively, after the expiry of the initial 12 month period, an application may be made for an extension of time to make an application for permission to renew the summons.

Limitations (Amendment) Act 1991, and the *Statute of Limitations (Amendment) Act 2000*.⁶

8. The 1957 Statute contains the relevant time limits for initiating many, though not all, civil actions. With the advent of an increasing amount of legislation that either involves the statutory codification of the relevant rules of civil liability or the creation of completely new areas of liability, it has become necessary to set out new limitation periods for these new types of proceedings. In some instances, this has involved making amendments to the *Statute of Limitations 1957*, but in others the relevant limitation period is simply included in the new legislation without reference to the *Statute of Limitations*. The result is that limitation periods are now to be found in a large number of Acts⁷ as well as in the *Statute of Limitations*.

9. In approaching the preparation of this Consultation Paper, therefore, the Commission is aware that, in reviewing the *Statute of Limitations* and making proposals for its reform, it must take account of the reality that some limitation periods are already to be found in other Acts. The Commission considers that the inclusion of limitation periods in specific Acts other than the *Statute of Limitations* has a clear practical advantage from the point of view of accessibility, namely that a person with an interest in that area will be able to

⁶ The *Statute of Limitations 1957* has also been amended on a number of occasions by other legislation, such as the *Civil Liability Act 1961*, the *Civil Liability and Courts Act 2004* and the *Defamation Act 2009*. See the list of Acts in fn.6, below. The Commission is currently preparing a Restatement (administrative consolidation) of the 1957 Statute as part of its *First Programme of Statute Law Restatement*: see *Report on Statute Law Restatement* (LRC 91-2008).

⁷ See e.g. *Civil Liability Act 1961*; ss.49 and 122, *Registration of Title Act 1964*; Schedule, *Civil Liability (Amendment) Act 1964*; Part XI, *Succession Act 1965*; s.22(7), *Family Law (Maintenance of Spouses and Children) Act 1976*; s.13(8), *Sale of Goods and Supply of Services Act 1980*; s. 23, *Malicious Injuries Act 1981*; s.3(6), *Animals Act 1985*; *Age of Majority Act 1985*; s.3(2), *Health (Amendment) Act 1986*; s.21(4), *Control of Dogs Act 1986*; s.133, *Bankruptcy Act 1988*; s.3, *International Carriage of Goods by Road Act 1990*; s.7, *Liability for Defective Products Act 1991*; Schedule 3, *Criminal Law Act 1997*; Schedule, *Stamp Duties Consolidation Act 1999*; s.134(2), *Copyright and Related Rights Act 2000*; s.50, *Personal Injuries Assessment Board Act 2003*; s.84(7), *Residential Tenancies Act 2004*; s.7, *Civil Liability and Courts Act 2004*; s.38, *Defamation Act 2009*. In addition, where new areas of liability arise under EC Directives, the implementing legislation may often take the form of Regulations made under the *European Communities Act 1972*, so that some relevant limitation periods are now to be found in such Regulations rather Acts of the Oireachtas.

see immediately the relevant limitation period for the subject in question rather than having to search separately in the *Statute of Limitations*. The Commission does not, therefore, consider that it would be useful (or feasible) to remove these limitation periods from specific Acts and to attempt to compile a *Statute of Limitations* containing *all* limitation periods for *all* civil actions. Indeed, no *Statute of Limitations* has attempted to do this.

10. While the *Statute of Limitations 1957* does not, therefore, contain a complete statement of the rules concerning limitation periods, the Consultation Paper concentrates on it because it continues to set out the limitation periods for many civil claims.

D Overview of the Statute of Limitations 1957

11. The 80 sections that make up the *Statute of Limitations 1957* involve a complex matrix that must be understood in its entirety in order to determine the applicable limitation period, the running of that period and the possibility of the extension of that period for some reason (such as the potential litigant being under age at the time of an incident or because of an external factor such as fraud).

12. The *Statute of Limitations 1957* contains what might be described as a traditional system of limitation, in which various civil actions, or causes of action, are identified and specific periods of limitation are assigned to each. At present, the *Statute* contains seven different limitation periods (1, 2, 3, 6, 12, 30 and 60 years) that apply to a wide range of civil actions. The civil actions to which these limitation periods apply are divided into four general headings:

- a. Common law actions, notably claims concerning contracts (including debt-related claims) and torts (including personal injury actions);⁸
- b. Actions for the recovery of land, which take up 30 of the 80 sections in the *Statute*;⁹
- c. Actions in respect of trust property;¹⁰
- d. Actions to recover the personal estate of a deceased person, such as the legal right share under the *Succession Act 1965*.¹¹

⁸ Sections 11 and 12, *Statute of Limitations 1957*.

⁹ Sections 13 to 42, *Statute of Limitations 1957*.

¹⁰ Sections 43 and 44, *Statute of Limitations 1957*.

¹¹ Sections 45 and 46, *Statute of Limitations 1957*.

13. As already indicated, *Statutes of Limitation* have never attempted to set out limitation periods for all types of civil actions. The *Statute of Limitations 1957* takes this approach by specifying that it does not apply to the following types of civil actions:

- Proceedings in respect of the forfeiture to the State of a ship or of an interest in a ship under the *Mercantile Marine Act 1955*;¹²
- Actions within the Admiralty jurisdiction of the High Court that are enforceable *in rem*;¹³
- Proceedings under the *Proceeds of Crime Act 1996*;¹⁴
- Actions for which a period of limitation is fixed by any other limitation enactment,¹⁵ such as the *Succession Act 1965*;
- Actions to which a State authority is a party and for which, if that State authority were a private individual, a period of limitation would be fixed by any other limitation enactment.¹⁶

E Scope of the Consultation Paper

14. The Commission intends to follow the approach taken in the 1957 Statute by leaving outside the scope of this Paper a number of specialist areas of civil actions. Thus, the Commission does not address the areas already excluded from the scope of the 1957 Statute, such as admiralty actions. Nor does the Paper deal with limitation periods concerning land, which merit separate treatment.¹⁷

¹² Section 4, *Statute of Limitations 1957*. See further in this respect: section 76, *Merchant Shipping Act 1894*; section 99, *Mercantile Marine Act 1955*.

¹³ Section 11(8), *Statute of Limitations 1957*. Note, however, section 11(8)(a), which provides that this exclusion does not apply to an action to recover seamen's wages, so that such claims are covered by the relevant limitation period in the 1957 Statute.

¹⁴ Section 10, *Proceeds of Crime (Amendment) Act 2005*.

¹⁵ Section 7(a), *Statute of Limitations 1957*.

¹⁶ Section 7(b), *Statute of Limitations 1957*. Where a State authority is party to an action in relation to which a limitation period is fixed for private citizens under an enactment other than the *Statute*, the State authority is subject to that limitation period (and not to the *Statute*).

¹⁷ The Commission has been involved in the reform of the substantive law of land law and conveyancing law (*Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), culminating in the enactment of the *Land*

15. As the focus of the Paper is on private law civil proceedings, the Paper does not address limitation periods in public law litigation, such as judicial review, planning, asylum or immigration proceedings.¹⁸ Any discussion of these public law areas in the Paper is intended to assist the Commission's approach to reform by reference to relevant general principles. Nor does the Paper address limitation periods for arbitration, mediation or conciliation¹⁹ or the specialised limitation periods that apply to employment-related claims.

16. Although the Paper does not address time limits concerning procedural matters that arise after proceedings have been initiated, the Commission examines the inherent power of the courts to dismiss civil proceedings, which arise where, for example, civil proceedings would be unfair to the defendant (because of delay) or for the (sometimes related) reason that they would involve an abuse of the process of the courts. Although this power of the courts is not currently dealt with in the *Statute of Limitations*, the Commission considers that it is of such direct relevance as to merit discussion here.

17. Having excluded certain areas from the scope of this project, the actual focus of the Commission's analysis is on what the *Statute of Limitations 1957* describes as common law actions. This category includes claims involving a breach of contract and actions concerning debt recovery. It also includes tort actions, notably personal injuries actions. From a practical point of view, these actions make up a large portion of the civil business of the courts. This can be gleaned from the Courts Service's *Annual Report 2007*, which provides the following figures for civil actions in the High Court, Circuit Court and District Court.

18. The civil business of the High Court increased by 25% between 2006 and 2007.²⁰ The following is a breakdown of the different actions initiated in 2006 and 2007:

and Conveyancing Law Reform Act 2009, which includes aspects of limitation periods. The Commission will also deal with the limitations aspects of the law of adverse possession under its *Third Programme of Law Reform 2008-2014*, Project 20.

¹⁸ The Commission addressed aspects of this in its *Report on Judicial Review Procedure* (LRC 71-2004) at 35-52.

¹⁹ The Commission has addressed some aspects of this in its *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50-2008), which forms part of its *Third Programme of Law Reform 2008-2014* (Project 5).

²⁰ Courts Service *Annual Report 2007*, available at www.courts.ie .

Actions commenced in the High Court	2006	2007	+ / -
New personal injuries summonses	2,673	5,951	+ 122%
Registration of judgments	2,960	3,324	+ 12%
New Claims for Liquidated Debts	1,894	2,292	+ 21%
New medical negligence claims	334	566	+ 70%
Actions under the <i>Companies Acts</i>	462	480	+ 4%
Judgment mortgage affidavits	402	471	+ 17%
Garda Compensation Act actions	171	317	+ 85%
European Arrest Warrant cases	171	207	+ 21%
<i>Lis pendens</i> registrations	127	274	+ 116%
Judgments on foot of Master's Order	157	196	+ 25%
New cases in the Commercial List ²¹	N/A	196	+ 73%
New family law cases	112	97	- 15%
Applications under <i>Solicitors Acts</i>	48	63	+ 30%

19. The civil business of the Circuit Court increased by 15% between 2006 and 2007.²² The following is a breakdown of the actions initiated in 2007:

Actions commenced in Circuit Court 2007	Claims	% of total
Breach of contract / debt collection	15,481	51%
Personal injuries actions	7,154	24%

²¹ The 2007 figure represents 43% of the total number of commercial cases listed since the Commercial Court commenced operation.

²² Courts Service *Annual Report 2007*. 30,435 Civil Bills were issued in 2007, compared to 26,503 in 2006.

Other actions	7,800	25%
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20. The general civil business of the District Court increased by more than 18% between 2006 and 2007,²³ while the Small Claims procedure²⁴ saw an increase of 25% in new applications.²⁵

21. This Consultation Paper focuses in particular on these civil actions, bearing in mind that they make up the great majority of the civil business of the courts. The Consultation Paper also contains a discussion (sometimes brief) of a number of other aspects of the *Statute of Limitations 1957* which may merit reform.

F Outline of the Consultation Paper

22. In Chapter 1, the Commission examines the history and evolution of the modern law on limitation of actions in order to identify the principles that ought to be applicable to a modern legislative framework. The Commission considers that a system of rules governing the limitation of actions must aim to ensure that legal arguments are resolved in an orderly and timely fashion. Any such system must be designed with a view to ensuring, to the greatest extent possible, fairness both to the plaintiff and to the defendant, with due regard to the public interest. The Commission is mindful, therefore, that a limitations system must take account of the competing rights and interests of plaintiffs, defendants and the public, as set out in the Constitution and the European Convention on Human Rights.

23. In Chapter 2, the Commission outlines in detail the current general statutory provisions on limitation of actions in Ireland, as set out in the *Statute of Limitations 1957* (as amended). The Commission also describes some of the difficulties and complexities arising from the current state of the law. The Commission begins by discussing the key basic limitation periods in the 1957 Statute, with particular emphasis on the common law actions (contract, debt-related claims and tort, including personal injuries claims) that form the focus of

²³ Courts Service *Annual Report 2007*. 49,965 actions were commenced in 2006, compared to 59,061 in 2007.

²⁴ This is an alternative method of commencing and dealing with disputes concerning certain small claims. The procedure is provided by District Court offices and is designed to handle certain consumer claims cheaply. See further *District Court (Small Claims Procedure) Rules 1999*, as amended.

²⁵ Applications relating to holidays accounted for more than 10% of the total of these claims. Notably, there was an increase of 94% in claims involving furniture, and an increase of 92% in claims involving damage to private property.

this Consultation Paper. For the sake of completeness, and to illustrate the wide variety of limitation periods in the 1957 Statute, the Commission also discusses the basic limitation periods for other forms of actions, even though it does not propose to make wide-ranging recommendations in respect of those other actions.

24. The Commission notes that, in general, the limitation periods under the *Statute of Limitations 1957* run from the date of accrual of the cause of action. In this respect, unless otherwise specified, the accrual of a right of action is governed by the common law. The Commission also notes that, subject to the specific exceptions discussed in the Chapter, no general discoverability rule applies in Ireland at present. The Commission also notes that, subject to the exceptions discussed, “ultimate” or “long stop” limitation periods are not a common feature of the current law of limitations in Ireland. The Commission then discusses the limited provision for judicial discretion to extend or dis-apply statutory limitation periods and also refers briefly to the (related) inherent discretion of the courts to dismiss claims where there has been undue delay; this is discussed in detail in Chapter 7.

25. The Commission discusses the provisions of the 1957 Statute that provide for the postponement of running of the various fixed limitation periods in the event of, for example, the plaintiff being under age or some external factor such as fraud. The Commission also discusses some necessary aspects of practice and procedure of the courts in respect of limitation periods.

26. The Commission then provides a summary of the complexities and problems that arise from the current state of limitations law in the 1957 Statute. The Commission completes Chapter 2 by briefly drawing conclusions from the analysis in the Chapter and makes a provisional recommendation on the need for reform. In this respect, the Commission considers that the *Statute of Limitations 1957* does not take account of the relevant principles that should apply to a modern legislative framework, as it is unnecessarily complex, and the Commission therefore concludes that it is in need of fundamental reform and simplification. Like Chapter 1, this Chapter therefore forms an essential background against which the reforms being proposed by the Commission are to be assessed.

27. In Chapter 3, the Commission discusses possible models for reform of the law on limitations, based on an examination of the approaches taken in a number of other States. This comparative review shows that a trend has emerged towards the introduction of a “core limitations” regime. The key features of core limitations regimes in other States are: a uniform basic limitation period; a uniform commencement date; and a uniform ultimate limitation period (“long-stop”). Chapter 3 examines these key features in detail,

and the Commission concludes by recommending that a form of core limitation system should be introduced in Ireland.

28. In Chapter 4, the Commission addresses the nature of the basic limitation period that would apply in a core limitations regime, and explores proposals as to the appropriate length of a uniform basic limitation period, and the date from which it should run. The Commission examines three trends in the reform of basic limitation periods: (a) reduction of the number of different limitation periods applicable; (b) introduction of “catch all” basic limitation periods; and (c) introduction of uniform basic limitation periods. The Commission concludes that a uniform basic limitation period be introduced. The Commission also examines the duration of the basic limitation period, bearing in mind that the duration of the various limitation periods that apply at present has been described as a matter of historical accident. The Commission provisionally recommends that a choice be made between two suggested options in this respect: either one basic limitation period of two years, or three basic limitation periods of one, two and six years. The Commission then examines the method by which the basic limitation period would run, recommending a date of knowledge test

29. In Chapter 5, the Commission discusses an ultimate limitation period or “long-stop” in the context of a core limitations regime. This would involve the introduction of a period of limitation beyond which no action could be brought, even if the cause of action has not yet accrued or is not yet discoverable. The Commission examines the history of ultimate limitation periods and also re-examines its previous recommendations on the introduction of ultimate limitation periods in specific civil actions. The Commission then examines the range of ultimate limitation periods enacted in other States, which includes periods of 10, 15 and 30 years’ duration. The Commission also examines the issue of the dates from which the ultimate limitation period should run, again based on a comparative analysis of the situation in other jurisdictions. In completing Chapter 5, the Commission examines the various approaches that have been taken to the application of ultimate limitation periods in personal injuries actions

30. In Chapter 6, the Commission assesses the merits and disadvantages that might arise if a judicial discretion was introduced which would allow the courts to extend or dis-apply limitation periods. The Commission examines the evolving approach to such a discretion in a number of different jurisdictions, noting that there has been considerable movement in the approach taken to this issue. Having analysed the merits and drawbacks of introducing such a discretion, the Commission sets out its conclusions and recommendation that such a discretion would not, in general, be required in the Commission’s proposed limitations regime.

31. In Chapter 7, the Commission discusses the connection between the law on limitation of actions and the inherent discretion of the courts to dismiss or strike out claims for failure to progress them (called “want of prosecution”). The Commission examines the general principles that have guided the courts for many years in applying this inherent jurisdiction. The Commission notes that a stricter approach to delay has been applied by the courts having regard to the relevant rights in the Constitution and the European Convention on Human Rights. The Commission provisionally recommends that the new limitations regime should be without prejudice to this inherent discretion of the courts.

32. In Chapter 8, the Commission completes the Consultation Paper by addressing what is variously described as the postponement, suspension, or extension of limitation periods. The discussion is framed by reference to the general view of the Commission that a simplified core limitations regime should be introduced to replace the unduly complex system that applies in Ireland at present. The Commission addresses the situation that arises where, for example, a plaintiff is under age. The Commission also questions the continued application of the current rules governing postponement of limitation periods because of, for example, part-payments. The Commission also discusses the merits of postponing the limitation period where the action is based on the fraud of the defendant or is concealed by fraud. The Commission concludes its analysis by examining the extension of the limitation period where the plaintiff is seeking relief from the consequences of a mistake.

33. Chapter 9 contains a Summary of the Commission’s provisional recommendations.

34. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the law of limitations following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **30 November 2009**.

CHAPTER 1 EVOLUTION OF THE LAW ON LIMITATION AND GUIDING PRINCIPLES

A Introduction

1.01 As the Commission has noted in the Introduction to this Consultation Paper, the *Statute of Limitations 1957*¹ contains a wide range of limitation periods that apply to a great number of civil actions. The *Statute* has been in force in Ireland for over 50 years, but the reasons for which one period of limitation applies to a particular action instead of another can generally be traced back to limitations legislation originating in the 17th and 18th centuries. The current six-year limitation period that is generally applicable to actions founded in contract, for example, can be traced as far back as the *Limitation Act 1623*.²

1.02 It is questionable whether the reasons for which the various limitation periods were assigned centuries ago remain applicable today. Thus, in 1623 communication and information-gathering was carried out in a manner that would be unrecognisable today. Communication and the retrieval of information and data are now, of course, infinitely easier and speedier. For many actions, the reason for which a particular period of limitation period applies has not been reconsidered for more than a century, if at all.

1.03 In light of the absence of recent analysis of the foundation for limitations law, the Commission considers it important, in the context of a general review of limitations law, to re-evaluate the policies and principles underlying limitations and it is considered that in order to identify the principles applicable to a modern statute of limitations, it is appropriate to first examine the history and evolution of modern limitations law.

1.04 In Part B, the Commission examines the early origins of the law on limitations of actions. In Part C, the Commission discusses the guidance which decisions of the Irish courts on the constitutionality of various limitation periods provides as to the future of limitations law. In Part D, the Commission discusses the relevance of case law under the European Convention on Human Rights to

¹ No. 6 of 1957.

² 21 James 1, c. 16.

limitation periods. In Part E, the Commission draws conclusions on the analysis made in the Chapter.

B The Origins of the *Statute of Limitations*

1.05 In the early history of common law, no time limit applied to the commencement of civil actions; the only restriction was found in equity, through the doctrines of *laches* and acquiescence. Limitation periods were first set by reference to a fixed period of time rather than a fixed date as of 1540, when an *Act of Limitation 1540* set limitation periods of 60, 50 and 30 years for actions to recover property.³ A statute of limitations dealing with common law actions was first enacted in England in 1623.⁴ Later limitations enactments dealt with various other aspects of limitation, including the application of limitation periods to the Crown,⁵ actions upon a specialty,⁶ actions to recover land or money charged on land,⁷ actions against trustees,⁸ and actions against public authorities.⁹ Statutes of limitation have traditionally applied to common law actions, namely actions founded in tort and simple or quasi-contract as it has generally been considered that such are amendable to limitations.¹⁰

1.06 These early statutes of limitations were based on a system whereby the assigned limitation period began to run at the date of accrual of the cause of action. Limitation periods of fixed duration were used; and limitation periods of different lengths were assigned to defined categories of action. Further features of the early systems were the suspension of the limitation period where the plaintiff was suffering from a disability, and the variation of the limitation period because of agreement or admission. The system was designed to operate as

³ 32 Hen VIII, c. 2 (1540).

⁴ 21 James 1, c. 16 (1623); *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42).

⁵ *Crown Suits Act 1769* (9 Geo. III, c. 16) (also known as the *Nullum Tempus Act*), amended by the *Crown Suits Act 1861* (24 & 25 Vic, c. 62).

⁶ *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42).

⁷ *Real Property Limitation Act 1833* (3 & 4 Will IV, c. 27); *Real Property Limitation Act 1874* (37 & 38 Vic, c. 57).

⁸ *Trustee Act 1888* (51 & 52 Vic, c. 59).

⁹ *Public Authorities Protection Act 1893* (56 & 57 Vic, c. 61).

¹⁰ See Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at Chapter 16.

mechanically as possible, as fixed rules of law;¹¹ it was that imperative that led to many of the problems that now haunt the modern statutes of limitations.

(1) The Limitation Act 1623

1.07 There were no limitation periods for actions unrelated to the recovery of land until the *Limitation Act 1623* was introduced to govern the limitation of 'common law actions'.¹² The 1623 Act was amended on many occasions,¹³ and became known as a 'statute of repose'.¹⁴ It did not address the limitation of actions to recover land, equitable claims, or actions in respect of trusts. It set a series of fixed limitation periods, running from a fixed date - generally the date of accrual of the cause of action. This formulation formed the basis for limitation statutes throughout the common law world. The limitation periods set by the Act include the following:

LENGTH	ACTION
2 years	Actions in the case for words
4 years	Actions of assault, menace, battery, wounding, and false imprisonment
6 years	Most other actions.

1.08 Many of the limitation periods applicable under the 1623 Act still apply in various common law jurisdictions.

1.09 The 1623 Act did not set limitation periods for contracts under seal (i.e. specialties); actions of account between merchants, their servants of factors; actions brought for debt under a special statute; or actions brought on a record. It was eventually supplemented by the *Civil Procedure Act 1833*,¹⁵ which prescribed the following limitation periods:

¹¹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 68.

¹² 21 James 1, c 16 (1623).

¹³ See e.g. *Administration of Justice Act 1707* (4 & 5 Anne, c. 3); 6 Anne, c.10 Ir (so as to include seamen's wages); 8 Geo 1, c.4 Ir; *Statute of Frauds Amendment Act 1828* (9 Geo IV, c .14); *Mercantile Law Amendment Act 1856* (19 & 20 Vic, c. 97).

¹⁴ *Bell v Morrison* (1828) 26 US 351, 360 (Story J., US Supreme Court).

¹⁵ 3 & 4 Will IV, c. 42 (1833).

LENGTH	ACTION
2 years	Actions to recover penalties
6 years	Actions of debt upon an award
20 years	Actions on a bond or other specialty

1.10 The 1623 Act and its successors were passed in order to give more precise effect to the presumption, already made by law, that after a long lapse of time, debts have been paid and rights satisfied.¹⁶ It is considered that the reasons for this presumption are twofold: first, it is desirable that there be an end to litigation, and that persons should not be exposed to the risk of stale demands; and secondly, it may be impossible for the defendant to prove his case owing to the passage of time, and the loss of documents or the death of witnesses.¹⁷ These dual requirements of certainty and fairness remain the crucial factors to be balanced in limitations law.

1.11 The English *Limitation Act 1623* did not apply to Ireland, but an Irish Statute was subsequently enacted, containing almost the same provisions.¹⁸

(2) Common Law Procedure (Ireland) Act 1853

1.12 The provisions that were enacted to regulate the limitation of actions in Ireland were generally drafted in terms identical to the English Acts.¹⁹ The *Common Law Procedure Amendment Act (Ireland) 1853*²⁰ consolidated and repealed the provisions previously applicable in Ireland.²¹ Subject to some

¹⁶ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at 8.

¹⁷ *Ibid* at 8-9.

¹⁸ *An Act for Limitation of Actions, and for avoiding of Suits in Law* (10 Car.1.sess.2, c. 6 Ir). Amended in 1707 (6 Anne, c.10 Ir), to include actions in respect of seamen's wages. Further amended in 1721 (8 Geo. 1, c.4 Ir).

¹⁹ See *An Act for Limitation of Actions, and for avoiding of Suits in Law* (10 Car.1.sess.2, c. 6 Ir); *An Act for Expedition of Justice in Cases of Demurrers, &c.* (10 Car. 1. Sess. 2. c.11); *An Act for [...] the further Amendment of the Law and the better Advancement of Justice in Ireland* (3 & 4 Vic. c. 105).

²⁰ Sections 20-30, *Common Law Procedure (Ireland) Act 1853* (16 and 17 Vic, c.113).

²¹ Schedule A of the 1853 Act repealed sections 14, 16 and 17 of the *Act for Limitation of Actions and for avoiding of Suits of Law* (10 Car. 1. Sess. 2. c. 6);

minor amendments,²² the 1853 Act remained in force in Ireland until the *Statute of Limitations 1957* came into force on January 1 1959.²³

1.13 The 1853 Act set the following fixed limitation periods:

COMMON LAW PROCEDURE AMENDMENT ACT (IRELAND) 1853	
2 years	Actions for words. ²⁴
	Actions for penalties, damages, or sums of money. ²⁵
4 years	Actions for trespass to the person (assault, menace, battery, wounding, and imprisonment). ²⁶
6 years	Actions grounded upon any lending or contract, express or implied, without specialty. ²⁷
	Actions upon any award where the submission is not by specialty. ²⁸
	Actions for any money levied on <i>feri facias</i> . ²⁹
	Actions of account or for not accounting (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants). ³⁰
	Actions for direct injuries to real or personal property. ³¹

the entirety of the *Act for Expedition of Justice in Cases of Demurrers, &c.* (10 Car. 1. Sess. 2. c.11) and sections 32-39 of the *Debtors (Ireland) Act 1840* (3 & 4 Vic, c.113).

²² See e.g. Schedule 1, *Courts of Justice Act 1936*.

²³ Section 1(2), *Statute of Limitations 1957*.

²⁴ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

²⁵ The English *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42) set the same period.

²⁶ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

²⁷ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

²⁸ The English *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42) set the same period.

²⁹ The English *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42) set the same period.

³⁰ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

	Actions for the taking away, detention, or conversion of property, goods and chattels. ³²
	Actions for libel, malicious prosecution and arrest, seduction, and criminal conversation.
	Actions for all other causes which would have been brought in the form of action called trespass on the case. ³³
20 yrs	Actions for rent upon an indenture of demise.
	Actions upon any bond or other specialty or recognizance. ³⁴
	Actions upon any statute staple or statute merchant. ³⁵
	Actions upon any judgment.

1.14 All of these limitation periods ran from the date of the cause of action, with the exceptions of actions for words, which ran from the date of the words spoken, and actions upon a judgment, which ran from the date of the judgment.

1.15 The 1853 Act also regulated the postponement of limitation periods,³⁶ and the effect of acknowledgements and part-payments on actions on account of specialty, upon a judgment, or upon a statute or recognizance³⁷ and liabilities on simple contract.³⁸ It did not deal with actions to recover land or money charged on land, or actions for trespass to land, which were dealt with by the *Real Property Limitation Acts 1833 to 1874*. Among the primary differences between these enactments was that whereas the 1853 Act barred the remedy but left the right intact, the 1833 and 1874 Acts barred both the remedy and the right. Moreover, the limitation periods applicable to land-related actions were

³¹ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

³² The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

³³ The English *Limitation Act 1623* (21 James 1, c. 16) set the same period.

³⁴ The English *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42) set the same period.

³⁵ The English *Civil Procedure Act 1833* (3 & 4 Will IV, c. 42) set the same period.

³⁶ Sections 21 and 22, *Common Law Procedure Amendment Act (Ireland) 1853* (16 & 17 Vic, c.113).

³⁷ *Ibid* at section 23.

³⁸ *Ibid* at section 24.

substantially lengthier than those applicable to actions unrelated to land. These distinctions remain today.

(3) Land-Related Actions

1.16 Until 1540, actions to recover land were subject to a limitation period that was set by reference to a fixed date.³⁹ Before 1237, this date was the day in 1135 (i.e. the date on which Henry I died). More recent dates were set in 1237 and 1275.⁴⁰

1.17 Fixed limitation periods were first prescribed for land-related claims under the *Act of Limitation 1540*.⁴¹ Among the limitation periods were:

LENGTH	ACTION
30 years	Claims based on the possession of the claimant
50 years	Writs of Mort d'auncestor, Cousinage, Aiel, Writs of Entry or other possessory actions and avowries for rents or services, formedons in remainder and reverter and scire facias on fines.
60 years	Writ of right.

1.18 The *Limitation Act* of 1623⁴² reduced the period for writs of formedon to twenty years, and provided that no person should make entry into any lands later than twenty years after his right of entry accrued.

1.19 In 1829, the Real Property Commissioners, reporting to the House of Commons, recommended the simplification of the limitation periods applicable to land actions, noting that a 20-year limitation period, being “the limitation which in this country is generally acted upon”, would “suit the convenience of society”.⁴³ A 20-year period was introduced under the *Real Property Limitation*

³⁹ F Pollock and FW Maitland *The History of English Law before the time of Edward I* (2nd ed 1968) at 81.

⁴⁰ Statute of Merton, 20 Hen III, c 8 (1235); Statute of Westminster, 3 Ed I c 39 (1275).

⁴¹ 32 Hen VIII, c. 2 (1540).

⁴² 21 James 1, c 16 (1623).

⁴³ *First Report of the Real Property Commissioners* (Parliamentary Papers, 1829) cited in Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 5.

Act 1833 for actions relating to land or money charged upon land, subject to some exceptions;⁴⁴ this period was amended with respect to mortgages in 1837⁴⁵ and reduced to 12 years by the *Real Property Limitation Act 1874*⁴⁶. The 1833 Act did not apply to Ireland, but sections 32 to 36 of the *Debtors (Ireland) Act 1840* (known as “Pigot’s Law”)⁴⁷ were almost identical to those contained in the 1833 Act.⁴⁸

(4) Reform in the 20th Century

1.20 It was apparent by the turn of the 20th century that the 1623 Act and its successors no longer formed a satisfactory basis for limitation law in England. As has been noted by the Law Reform Commission of New South Wales, those Acts were “cast in a language explicable only by reference to court procedures, and forms of landholding, and institutions, which otherwise are rarely of any but antiquarian interest to the practising lawyer, or to the citizen, of today.”⁴⁹

1.21 The UK Parliament authorised the Law Revision Committee, chaired by Lord Wright, to consider the reform of limitations law. The Wright Committee reported in 1936 that the language of the 1623 Act was “unsatisfactory and obscure” as it was drafted in terms of old forms of action that had since been abolished.⁵⁰ The Wright Committee suggested that it might be desirable to adopt a more flexible system, and to that end it evaluated two options:

⁴⁴ Section 2, *Real Property Limitation Act 1833* (3 & 4 Will IV, c 27).

⁴⁵ *An Act to amend an Act of the Third and Fourth Years of His late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto* July 3 1837 (1 Vic, c 28).

⁴⁶ Section 1, *Real Property Limitation Act 1874* (37 & 38 Vic, c 57). Section 9 thereof repealed and replaced sections 2, 5, 16, 17, 23, 28, 40 of the 1833 Act.

⁴⁷ Brady & Kerry *The Limitation of Actions* (2nd ed 1994) at 3.

⁴⁸ Sections 32-36, *An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for the further Amendment of the Law and the better Advancement of Justice in Ireland* (3 & 4 Vic. c. 105).

⁴⁹ New South Wales Law Reform Commission *First Report on Limitation of Actions* (LRC 3, October 1967) at 8.

⁵⁰ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at paragraph 5. With respect to such abolition, see *the Common Law Procedure Acts* and the *Judicature Act 1873*.

- i) The introduction of judicial discretion to extend a fixed limitation period running from accrual in appropriate cases, or
- ii) Running a fixed limitation period from the date on which the plaintiff knows of the existence of his claim.

1.22 Ultimately, however, the Committee rejected both of these options, considering that each would create undue uncertainty.⁵¹ Instead, it recommended the retention of the traditional approach (i.e. a fixed limitation period running from accrual). Nevertheless, the Wright Committee's consideration of these two options marked the first indication of a trend of increasing flexibility in limitations law, which has since marked the general flow of reform of limitations law. The Wright Committee Report and the ensuing English *Limitation Act 1939*⁵² paved the way for limitations reform throughout the common law world, over the next 50 years. The *Limitation Act 1939* substantially implemented the recommendations of the Wright Committee; in fact, it has been suggested that the reforms introduced by the 1939 Act exceeded the recommendations of that Committee.⁵³ The idea of a fixed limitation period running from accrual, as implemented in the 1939 Act, formed the basis of limitation law in many common law jurisdictions, including Ireland, New Zealand, Australia and Canada.

1.23 The *Limitation Act 1939* worked simply and was considered a success.⁵⁴ With time, however, it became clear that the traditional approach of a fixed limitation period running from accrual did not solve all problems and, in particular, did not address problems such as latent personal injury and latent damage property. The Act was amended on several occasions as various difficulties came to light, most notably by the *Law Reform (Limitation of Actions &c.) Act 1954*⁵⁵ the *Limitation Act 1963*⁵⁶ and the *Limitation Act 1975*⁵⁷, which respectively implemented the recommendations made in the reports of the Tucker Committee (1949), Edmund Davies Committee (1962) and Orr Committee (1974). These Acts were consolidated by the *Limitation Act 1980*,

⁵¹ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at paragraph 7.

⁵² 2 & 3 Geo. 6, c. 21.

⁵³ See further Unger "Statutes: Limitation Act, 1939" 4 MLR 45 (1940-41) at 45.

⁵⁴ Newson & Abel-Smith *Preston and Newsom on Limitation of Actions* (3rd ed 1953) at v.

⁵⁵ 2 & 3 Eliz. 2, c. 36.

⁵⁶ c.47.

⁵⁷ c.54.

which now regulates the law of limitation in England and Wales. A new wave of limitation reform has recently been recommended by the Law Commission of England and Wales, but these recommendations have not yet been implemented.

C Competing Constitutional Interests

1.24 The Commission considers that in addition to the history of limitations law, guidance as to the appropriate approach to be adopted for the future in this area may be found in the judgments of the Irish Courts as to the constitutionality of various limitation periods over the past 50 years.

1.25 It must be borne in mind that statutory limitation periods have the potential to extinguish even the strongest of claims.⁵⁸ Any legislation devising limitation rules must, therefore, strike a balance between the competing interests involved.⁵⁹ The Commission had previously recognised, and maintains the view, that the following three key interests must be considered:⁶⁰

- a. The plaintiff's Interests and rights;
- b. The defendant's Interests and rights; and
- c. The public interest.

1.26 In brief, a limitation period should support the plaintiff's right of access to the courts prescribed by the Constitution, while encouraging plaintiffs to make claims without undue delay, and thereby protect defendants from the unjust pursuit of stale claims.⁶¹ It must be accepted that it is difficult to do complete justice to all of these interests. That said, it must be the aim of all limitations legislation to strike a fair balance between the interests involved, and to avoid doing injustice to any party.

1.27 Article 15.4 of the Constitution prohibits the Oireachtas from enacting laws that are repugnant to the provisions of the Constitution. In *O'Brien v Manufacturing Engineering Co. Ltd*, Walsh J. noted as follows:

“Rights conferred by the Constitution, or rights guaranteed by the Constitution, are of little value unless there is adequate opportunity for

⁵⁸ Adams “Provincial Statutes of Limitations and Historical Interference with Indian Lands” (2001) 7 Appeal: Rev. Current L. & L. Reform 32, 32.

⁵⁹ Law Reform Commission *Consultation Paper on The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (CP16-2000) at paragraph 1.20.

⁶⁰ *Ibid* at paragraph 1.14.

⁶¹ New Zealand Law Commission *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 4.

availing of them; any legislation which would create such a situation must necessarily be invalid, as would any legislation which would authorise the creation of such a situation.”⁶²

1.28 It follows that limitation periods must provide litigants with adequate opportunity to avail of the rights protected under the Constitution. The following discussion seeks to illustrate how the Courts have balanced the competing constitutional rights of litigants.

(1) The Plaintiff's Interests

1.29 The right of access to the courts is an unenumerated personal right guaranteed by Article 40.3.1° of the Constitution.⁶³ As such, it is one of the fundamental rights of Irish citizens,⁶⁴ which the State is obliged to respect, vindicate and defend.⁶⁵ The Courts have recognised that the right to litigate is “a necessary inference” from Article 34.3.1° of the Constitution, which establishes the full original jurisdiction of the High Court, and that its existence is confirmed by the procedure outlined in Article 40.4 for challenging unlawful detention.⁶⁶ Furthermore, the right to litigate is the means through which the personal rights protected by the Constitution may be asserted and enforced.⁶⁷

1.30 At its broadest, the right of access to the courts may be expressed as the right to litigate.⁶⁸ This entitles an aggrieved person who has a legitimate civil claim against another to pursue his claim in the courts.⁶⁹ It has also been described as a right to bring proceedings,⁷⁰ “the right to litigate claims”,⁷¹ or “to

⁶² *O'Brien v. Manufacturing Engineering Co. Ltd* [1973] IR 334, 366.

⁶³ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358; *Murphy v Minister for Justice* [2001] 1 IR 95, 98

⁶⁴ *Buckley and Others (Sinn Féin) v The Attorney General & anor* [1950] IR 67, 81. Article 40.3.1° provides as follows:- “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

⁶⁵ In *Murphy v Minister for Justice* [2001] 1 IR 95, 98-99.

⁶⁶ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358.

⁶⁷ *Byrne v Ireland* [1972] IR 289, 292-3.

⁶⁸ *White v Dublin City Council and the Attorney General* [2004] 1 IR 545, 567; *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 364.

⁶⁹ *White v Dublin City Council and the Attorney General* [2004] 1 IR 545, 567. See also *Murphy v Greene* [1990] 2 IR 566, 578.

⁷⁰ *Buckley and Others (Sinn Féin) v Attorney General* [1950] IR 67, 84.

have recourse to the Courts for the purpose of having determined any justiciable controversies between a citizen and the State”.⁷² Also incorporated are the rights “to have recourse to the High Court to defend and vindicate a legal right”,⁷³ and “to question the validity of any law having regard to the provisions of the Constitution”.⁷⁴ The right to litigate applies to “every individual, be he a citizen or not”.⁷⁵ The Constitution Review Group in 1996 expressed the objective of the right of access as being “to ensure that these minimum standards of legality and fair procedures are not otherwise jeopardised.”⁷⁶

1.31 The Supreme Court has held that in order for a time-limit to be sufficiently wide as to ensure sufficient access to the courts, consideration must be given to all the circumstances of the case including language difficulties, difficulties with regard to legal advice or otherwise.⁷⁷ In addition, plaintiffs must be given a reasonable length of time within which to ascertain whether or not they have a right of action, and to institute that action.⁷⁸

1.32 It is noteworthy that the right to litigate has also been recognised as a property right, which must be vindicated under Article 40.3.2° of the Constitution.⁷⁹ In *O'Brien v Keogh*⁸⁰ the parties conceded that this was the case and Ó Dálaigh CJ expressly stated that counsel on behalf of the Attorney General was correct to concede on this point and went on to find a provision of the *Statute*⁸¹ to be repugnant to Article 40.3.2°. In *Moynihan v Greensmyth*,⁸² doubts were expressed by the Supreme Court as to the correctness of the

⁷¹ *O'Brien v Keogh* [1972] IR 144, 155.

⁷² *Byrne v Ireland* [1972] IR 289, 293.

⁷³ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358.

⁷⁴ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, 358.

⁷⁵ *Murphy v Greene* [1990] 2 IR 566, 578.

⁷⁶ *Report of the Constitution Review Group* (1996) at 134.

⁷⁷ *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 394.

⁷⁸ *O'Brien v. Manufacturing Engineering Co. Ltd* [1973] IR 334, 366.

⁷⁹ Article 40.3.2° provides as follows: “The State shall, in particular, by its laws protect as best it may from unjust attack and, in the name of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

⁸⁰ *O'Brien v Keogh* [1972] IR 144.

⁸¹ Section 49(2)(a)(ii), *Statute of Limitations 1957*.

⁸² *Moynihan v Greensmyth* [1977] IR 55.

concession made by Ó Dálaigh CJ, and it was suggested that the matter should be reviewed in an appropriate case. In *Cahill v Sutton*,⁸³ however, Finlay P. in the High Court felt obliged to proceed upon the assumption, accepted by Ó Dálaigh CJ in *O'Brien v Keogh*,⁸⁴ and in *Ó Domhnaill v Merrick*, McCarthy J (in the Supreme Court) also referred to the decision in *O'Brien v Keogh*.⁸⁵ Furthermore, in *Brady v Donegal County Council*, the plaintiffs argued that the right to challenge the validity of decisions of the respondent Council was a property right within the meaning of Article 40.3.2°. The Attorney General (who was the second named respondent in that case) did not contest that the plaintiffs' claim was a property right; rather, his case was that there had been no unjust attack.⁸⁶

(2) The Defendant's Interests

1.33 In *KM v HM*,⁸⁷ the Supreme Court of Canada assessed the underlying rationales of limitation law from the perspective of fairness to the defendant. LaForest J. distinguished the following three rationales:

- (a) *The certainty rationale*. Statutes of limitation have long been said to be statutes of repose. There comes a time when a defendant should be secure in his reasonable expectation that he will not be held to account for incidents that occurred many years previously.
- (b) *The evidence rationale*. It is not desirable to litigate claims that are based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.
- (c) *The diligence rationale*. Plaintiffs should act diligently and not sleep on their rights.⁸⁸

1.34 The Commission considers this to be an instructive statement of the law. It also considers that the constitutional rights to a fair trial and to the private ownership of property are factors to be weighed in the balance when considering the law of limitation.

⁸³ *Cahill v Sutton* [1980] 1 IR 269.

⁸⁴ *Cahill v Sutton* [1980] 1 IR 269, 272.

⁸⁵ *Ó Domhnaill v Merrick* [1984] 1 IR 151, 161

⁸⁶ *Brady v Donegal County Council* [1989] ILRM 282.

⁸⁷ (1992) 96 DLR (4th) 289.

⁸⁸ *KM v HM* (1992) 96 DLR (4th) 289, 301-305 (emphasis added), cited by Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 3611, 1997) at paragraph 7.5.

(a) The Right to a Fair Trial

1.35 Limitation periods are derived from the principle that “[w]hile justice delayed may not always be justice denied, it usually means justice diminished”.⁸⁹ It is beyond doubt that defendants have a right to a speedy trial; indeed, the right has been traced remotely from the Assize of Clarendon (1166), but more directly from Magna Carta (1215).⁹⁰ The right to a speedy trial is a facet of the constitutional right to fair procedures and is protected under Article 38.1 of the Constitution; it is a right that “cannot be defeated by the operation of a particular limitation period.”⁹¹ It is well established that a long delay between the events alleged and the trial of an action may strip defendants of their Constitutional right to a fair trial. Stale claims create a risk of injustice to defendants. As has been noted by the English Court of Appeal, the delay of justice is a denial of justice⁹² or, in other words, the chances of being able to find out what really happened are progressively reduced as time goes on, and this “puts justice to the hazard.”⁹³

1.36 A delay in the commencement of proceeding may equate to a failure to notify the defendant within a reasonable time of the claim made against him.⁹⁴ When faced with a claim, a defendant is entitled to be provided with particulars of the wrong alleged, the full nature and extent of the injury and loss claimed, and the contention alleged between those two factors. This information is required so that the defendant can assess the extent of the damages that may be awarded against him.⁹⁵ If the defendant is given insufficient notice of the claim against him, or where notice is given some significant period of time after the events giving rise to the claim, it may be more difficult to carry out sufficient enquiries to enable the defendant to present a full defence. Conversely, where a defendant is given an early opportunity to know with some precision the case being made against them, any delay thereafter is less likely to cause serious prejudice.⁹⁶

⁸⁹ *Ó Domhnaill v Merrick* [1984] IR 151, 158.

⁹⁰ *The State (O’Connell) v Fawsitt* [1986] IR 362, 365.

⁹¹ *Southern Mineral Oil Limited (in liquidation) v Coonev* [1997] 3 IR 549, 562.

⁹² *Allen v Sir Alfred McAlpine Sons & anor* [1968] 2 QB 229, 245.

⁹³ *Allen v Sir Alfred McAlpine Sons & anor* [1968] 2 QB 229, 255.

⁹⁴ *Tuohy v Courtney* [1994] 3 IR 1, 48.

⁹⁵ *O’Connor v John Player & Sons Ltd* [2004] 2 ILRM 321 (headnote), cited as a “useful summary of the judgment” in *Shanahan v P.J. Carroll & Co. Ltd* [2007] IEHC 229.

⁹⁶ *Rogers v Michelin Tyre plc* [2005] IEHC 294.

1.37 The delay may also give rise to “fading memories, unavailability of witnesses, through death or for other reasons, the destruction of evidence or changes in circumstances”.⁹⁷ The loss or deterioration of evidence is a particular problem for defendants who are providers of goods or services as they will often find it difficult to identify which transactions will give rise to a cause of action.⁹⁸ Further, the scene of the accident may have changed, medical and other evidence may have lost sharpness or reality, and money values may have changed out of all recognition.⁹⁹ These factors may prejudice the ability of a defendant to contest the plaintiff’s claim.¹⁰⁰ It may then be unfair to expect the potential defendant to meet the claim.¹⁰¹

1.38 In *Ó Domhnaill v Merrick*, the Supreme Court considered that it would be “contrary to natural justice and an abuse of the process of the court” to require a defendant to meet a claim in respect of an accident that had occurred some 24 years earlier.¹⁰² Here, the plaintiff’s delay was found to be inordinate and inexcusable, and the Court found that no countervailing circumstances existed that would swing the balance of justice in his favour. The Court ruled that in such cases, “it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial”, as a trial “would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both”.¹⁰³

1.39 In *O’Keeffe v Commissioners of Public Works*, the plaintiff sought damages in respect of an accident that had occurred almost 23 years previously. Henchy J. in the Supreme Court ruled that:-

“A hearing in those circumstances would be a parody of justice, for it would come at a time when the defendants, through no fault of theirs,

⁹⁷ *White v Dublin City Council* [2004] 1 IR 545, 56. See also *Kelly v O’Leary* [2001] 2 IR 526; *Sheehan v Amond* [1982] 1 IR 235; *Allen v Sir Alfred McAlpine Sons & anor* [1968] 2 QB 229, 255.

⁹⁸ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, July 2002) at 6.

⁹⁹ *Sheehan v Amond* [1982] IR 235, 238.

¹⁰⁰ Law Reform Commission *Consultation Paper on The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (CP16-2000) at paragraph 1.19.

¹⁰¹ *White v Dublin City Council* [2004] 1 IR 545, 568.

¹⁰² *Ó Domhnaill v Merrick* [1984] IR 151, 157.

¹⁰³ *Ó Domhnaill v Merrick* [1984] IR 151, 158.

had been deprived of any true opportunity of meeting the plaintiff's case."¹⁰⁴

1.40 The effects of delay on the fairness of civil trials was given by Hardiman J. in his judgment in *J. O'C. v The Director of Public Prosecutions*,¹⁰⁵ which may be summarised as follows:-

(a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice;

(b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard;

(c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial;

(d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice;

(e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.¹⁰⁶

1.41 Closely linked to the defendant's right to a fair trial is the right "to have some peace of mind and to regard the incident as closed" which applies both to institutions and to individual defendants.¹⁰⁷ Limitation periods must be

¹⁰⁴ *O'Keeffe v Commissioners of Public Works* Supreme Court 24 March 1980. There had been only two witnesses to the accident, one of whom was dead. The other witness' memory had been "all but obliterated by the passage of time." Additionally, the store in which the accident took place had been "redesigned out of all recognition."

¹⁰⁵ *J O'C v Director of Public Prosecutions* [2000] 3 IR 478, 499-500. Hardiman J was in a minority in terms of the outcome of the case, but this summary of the effects of delay is not affected by this.

¹⁰⁶ This summary of principles was adopted and applied by the High Court in *Manning v Benson & Hedges Ltd* [2004] 3 IR 556, 568.

¹⁰⁷ *Southern Mineral Oil Limited (in liquidation) v Coonev* (1997) 3 IR 549, 562.

designed, therefore, to promote “a certainty of finality in potential claims.”¹⁰⁸ In the absence of limitation periods, defendants would be subject to open-ended threats of liability. The finality of claims enables a person to feel confident, after a certain period of time, that a potential dispute cannot then arise.¹⁰⁹ Potential defendants then gain the freedom to arrange their domestic, commercial or professional affairs, unhindered by “unknown or unexpected liabilities.”¹¹⁰ It is for this reason that the statutes of limitation are also known as “statutes of repose”.¹¹¹

(b) The Right to Own Property

1.42 The private ownership of property is a fundamental right guaranteed by Article 43 of the Constitution. Article 43.1.1° states that this right is a “natural right, antecedent to positive law”. Article 43.1.2° provides that “[t]he State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.” One of the objects of the *Statute of Limitations 1957* is “to help people to establish title to land”.¹¹² It was felt that “it is most desirable that title to [land] may be established after clear possession for a reasonable period.”¹¹³

1.43 The imposition of limitation periods on property or land-related actions necessarily interferes with the constitutionally-protected right to property. Indeed, the limitation of land-related actions under the *Statute of Limitations 1957* has particularly grave implications, as the expiry of the 12-year limitation period leads to the extinction of title to the land. Limitation periods in respect of other actions (i.e. tort, contract etc) merely bar the right to take an action. The rationale behind the doctrine of adverse possession, which underlies the extinction of title, is that land should be marketable, and that legal title should reflect possession.¹¹⁴

¹⁰⁸ *Tuohy v Courtney* [1994] 3 IR 1, 48.

¹⁰⁹ See Law Commission of Western Australia *Limitation and Notice of Actions* (Project No 36 Part II, Discussion Paper, January 1985) paragraph 1.2.

¹¹⁰ *Tuohy v Courtney* [1994] 3 IR 1, 48.

¹¹¹ *Birkett v James* [1978] 1 AC 297, 331.

¹¹² Oireachtas Debates, Seanad Eireann, volume 47, January 16 1957, *Statute of Limitations Bill 1954 – Second Stage* at 57.

¹¹³ *Ibid* at 58.

¹¹⁴ See Turner “The Doctrine of Adverse Possession: Is it Equitable?” *The Property Valuer*, Autumn 2006 at 18-21.

1.44 Owing to the grave consequences of the expiry of the limitation period for land-related actions, factors “over and above” those generally considered in relation to limitation periods must be present in order to justify the limitation period imposed in relation to land-related actions.¹¹⁵ The High Court has accepted that a cause of action in common law for damages for personal injury caused by negligence is a property right and is covered by the provisions of Article 40.3.2°.¹¹⁶ The Supreme Court recognised in *Tuohy v Courtney* a “constitutional right of a defendant in his property to be protected against unjust or burdensome claims”.¹¹⁷ The Supreme Court has also held that if a legislative provision provides for a limitation period “of unreasonably short duration”, it may be in breach of Article 40.3.2°.¹¹⁸

(3) The Public Interest / The Common Good

1.45 The Supreme Court has recognised that there is a public interest or “requirement of the common good” in the avoidance of stale or delayed claims.¹¹⁹ Limitation periods discourage plaintiffs from sitting on their rights and from delaying unreasonably in instituting proceedings.¹²⁰ This ensures that the judicial system is not burdened with old claims and disputes that could reasonably have been sorted out earlier.¹²¹ Limitations periods, therefore, promote efficiency within the courts system.

1.46 The public interest was expressed by Peart J. in *Byrne v Minister for Defence* as follows:

“[...] a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and important time of the courts and thereby reduce

¹¹⁵ Law Commission for England and Wales *Report on land registration for the Twenty-First Century - A Consultative Document (jointly with the HM Land Registry)* (Law Com 254, 1998) at paragraph 10.6.

¹¹⁶ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 366-67. In this case, however, the Supreme Court reserved judgment as to whether the right to sue claimed by the plaintiff was a property right and, if so, whether it was one of the property rights guaranteed by Article 40(3)(2) of the Constitution.

¹¹⁷ *Tuohy v Courtney* [1994] 3 IR 1, 47.

¹¹⁸ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 367.

¹¹⁹ *Tuohy v Courtney* [1994] 3 IR 1, 47.

¹²⁰ Law Reform Commission *Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (CP16-2000) at paragraph 1.20.

¹²¹ *Ibid* at paragraph 1.19.

the availability of that much used and need resource to plaintiffs and defendants who have acted promptly in their litigation, as well as increase the cost to the Courts Service and through that body to taxpayers, of providing a service of access to the courts which serves best the public interest.”¹²²

1.47 Peart J. held, however, that while the *Statute of Limitations* has the capacity to protect the right of the defendant to an expeditious hearing and to finality, and the defendant’s right not to be adversely prejudiced in his defence by delay for which he bears no responsibility, the *Statute* “serves no purpose in the protection of the public interest” outlined above.¹²³

1.48 There is, arguably, a clear public interest in achieving justice in judicial decision-making. Limitation periods promote the expeditious trial of civil actions. Where a trial is conducted as quickly as possible and as close in point of time to the events upon which they are based, witnesses’ recollections are still clear, and their oral evidence will be more precise. The court should therefore have before it the relevant material upon which it can make its decision, i.e. accurate oral evidence and complete documentary proof; this provides a major contribution to the “correctness and justice of the decision”.¹²⁴

1.49 The avoidance of unnecessary costs and wasteful appeals procedures also falls within the public interest.¹²⁵ It must also be considered that it is in the public interest that a balance be struck between the need to discourage delay in seeking redress, and the consideration that no encouragement should be given to precipitate legislation. As was noted by the House of Lords in *Cartledge v E Jopling & Sons Ltd*, it is undesirable that workmen to be encouraged to keep their eyes on the courts.¹²⁶

1.50 It is interesting to note that the New Zealand Law Commission has observed that where a balance is achieved between the interests of the defendant and those of the plaintiff, “then the public interest will usually be found to have been taken care of.”¹²⁷

¹²² *Byrne v Minister for Defence* [2005] 1 IR 577, 585.

¹²³ *Ibid* at 585.

¹²⁴ *Tuohy v Courtney* [1994] 3 IR 1, 48.

¹²⁵ *Brady v Donegal County Council* [1989] ILRM 282, 289.

¹²⁶ *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189, 195.

¹²⁷ New Zealand Law Commission *Tidying the Limitation Act* (NZLC R 61, July 2000) at paragraph 1.

1.51 Economics are a further relevant consideration when assessing the various aspects of limitation, especially from the point of view of insurance. It is arguable that if the finality of potential claims was not ensured by limitation periods, the burden of insuring against and defending unlimited claims would result in higher costs of insurance premiums, which would affect all members of society.¹²⁸ In *Ó Domhnaill v Merrick*, Henchy J. noted that “[a]part from the personal unfairness that such a trial would thrust on the defendant”, to allow a trial to proceed 24 years after the alleged accident would be “unfair for being incompatible with the contingencies which insurers of motor vehicles could reasonably be expected to provide against.”¹²⁹

1.52 The Law Reform Commission of Western Australia has also noted that the community’s interests are served by ensuring that disputes are not dragged on interminably, and by ensuring that litigation is not delayed by many years.¹³⁰ Similarly, the New Zealand Law Commission has noted that there is a public interest in protecting defendants from stale claims, as the passage of time may make trials slower and therefore more expensive to the state as the provider of a dispute resolution mechanism. That Commission further noted that “[t]he adverse economic effect on defendants of having potential claims lying round too long can harm the health of the commercial sector generally.”¹³¹

1.53 A useful précis of the weight that may be accorded to the public interest when assessing the constitutionality of limitation periods was provided by Costello J. in *Brady v Donegal County Council*, as follows:-

“The public interest in (a) the establishment at an early date of certainty in the development decisions of planning authorities and (b) the avoidance of unnecessary costs and wasteful appeals procedures is obviously a real one and could well justify the imposition of stringent time limits for the institution of court proceedings.”¹³²

(4) Judicial Review: Restricted Limitation Periods

1.54 Increasingly, short time-limits are being prescribed by legislation within which judicial review proceedings in respect of particular decisions and/or

¹²⁸ Law Reform Commission *Consultation Paper on The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (CP16-2000) at paragraph 1.19.

¹²⁹ *Ó Domhnaill v Merrick* [1984] 1 IR 151, 158.

¹³⁰ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraph 7.6.

¹³¹ New Zealand Law Commission *Tidying the Limitation Act* (NZLC R 61, July 2000) at paragraph 1.

¹³² *Brady v Donegal County Council* [1989] ILRM 282, 288.

decision-makers must be commenced.¹³³ Such short time-limits have generally been introduced where the need for finality and certainty is considered to be particularly strong.¹³⁴ Guidance as to the balancing of the interests involved in the limitation of actions may be gleaned from a series of cases decided by the Irish courts with respect to the constitutionality of those short time-limits.

(a) Planning and Development Cases

1.55 Short time limits for challenging the validity of planning decisions by way of judicial review have become a general feature of planning legislation. The Supreme Court has interpreted the purpose of these time limits as follows:-

"[I]t is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."¹³⁵

1.56 It is instructive to consider the approach taken by the Courts as to the constitutionality of the time limits imposed in planning legislation. In brief, a two-month time limit was introduced in 1976 under section 82 of the *Local Government (Planning and Development) Act 1963*. That time-limit was found to be unconstitutional by the High Court in 1989 in the absence of a "saver" allowing for the extension of the period, but that finding was not endorsed in the Supreme Court. Section 82, as amended, was found to be unconstitutional by the Supreme Court in 2004. Under the *Planning and Development Act 2000*, a new, eight-week time-limit supplemented by a "saver" was introduced.

¹³³ See e.g., s.82, *Local Government (Planning and Development) Act 1963*; s.78(2) of the *Housing Act 1966*; s.85(8), *Environmental Protection Agency Act 1992*; s.43(5), *Waste Management Act 1996*; s.12(2), *Transport (Dublin Light Rail) Act 1996*; s.13(3) of the *Irish Takeover Panel Act 1997*; s.73(2), *Fisheries (Amendment) Act 1997*; s.55A, the *Roads Act 1993* (inserted by s.6 of the *Roads (Amendment) Act 1998*); and s.5(2), *Illegal Immigrants (Trafficking) Act 2000*.

¹³⁴ Delany "Extension of Time for Bringing Judicial Review Pursuant to s.5 of the *Illegal Immigrants (Trafficking) Act 2000*" (2002) 20 *ILT* 44.

¹³⁵ *K.S.K. Enterprises Ltd. v An Bord Pleanála* [1994] 2 *IR* 128, 135.

(i) S. 82(3A), Planning and Development Act 1963, as amended

1.57 Prior to the 1976, the position was that a challenge to the validity of a planning decision could be brought by way of application for *certiorari* within six months and by way of an application for declaratory relief within six years after the decision had been made. The position changed in 1976 when section 82(3A) of the *Local Government (Planning and Development) Act 1963* was introduced.¹³⁶ Under section 82(3A), challenges to the validity of planning decisions had to be made within two months of the decision being “given”. No ‘saver’ was provided allowing for the extension of the time-limit.

1.58 The constitutionality of section 82(3A) was first considered in *Brady v Donegal County Council*.¹³⁷ The approach taken by the High Court in that case is instructive in terms of the principles guiding the assessment of limitation periods. Costello J. acknowledged that the Oireachtas is required to strike a balance between competing interests, as follows:-

“Sometimes the interests which compete are, on the one hand, some requirement of the common good and, on the other, the interests of holders of some constitutionally entrenched right (of which the Planning Acts themselves afford a ready example, involving as they do a balance between the protection of the environment and the rights of the owners of private property). Sometimes the competing interests may be those of two different classes of individuals (as, for example, the interests of prospective plaintiffs in the enactment of legal claims which the *Statute of Limitations Act 1957* sought to reconcile with the interests of prospective defendants in being protected from stale claims).”¹³⁸

1.59 Costello J. noted that a new system had been introduced in 1976 under which objectors had 21 days in which to appeal to An Bórd Pleanála against a decision of a planning authority.¹³⁹ In that context, he considered that section 82(3A) was inserted for the following purposes:-

- (i) To ensure in the national interest that uncertainty about development applications should be dispelled at the earliest possible date, and
- (ii) To make applicants for permission and planning authorities aware at an early date that a permission decision was being challenged in legal proceedings so as to enable applications for adjournments of

¹³⁶ By section 42 of the *Local Government (Planning and Development) Act 1976*.

¹³⁷ *Brady v Donegal Co. Council* [1989] ILRM 282.

¹³⁸ *Brady v Donegal Co. Council* [1989] ILRM 282.

¹³⁹ See *Cavern Systems Ltd v Clontarf Residents' Association* [1984] ILRM 24.

planning appeals to be made and so avoid unnecessary costs and unnecessary waste of the time of public officials.¹⁴⁰

1.60 Thus, the Oireachtas was not seeking to strike a balance between the rights of property owners and adjoining property owners; rather, it was balancing the public interest in the application of the planning code with the right of members of the public to challenge the decisions of planning authorities.

1.61 Costello J. found the remarks expressed by Henchy J. in *Cahill v Sutton*¹⁴¹ about the constitutional validity of the then three year limitation period to be “of considerable relevance.” Costello J. explained the relevance of those views as follows:-

“The Supreme Court drew attention to the justice in providing in a Limitation Act a saver in favour of plaintiffs whose ignorance of their cause of action was not attributable to any fault of theirs. *A fortiori*, a limitation period which contains no saver of plaintiffs whose ignorance of their cause of action is attributable to the defendants wrong-doing would appear to be unjust and, very likely, unconstitutional.”¹⁴²

1.62 Following the example set by Finlay CJ in *Cahill v Sutton*,¹⁴³ Costello J. proposed to assess the reasonableness of section 82(3A) by reference to:-

“(a) ... whether the plaintiffs have shown (and the onus is on them) that the two-month limitation period is unreasonable having regard to the competing interest which the Oireachtas was required to reconcile, and in particular,

(b) whether the absence of a saver clause in the legislation which would enable the court to lift the two-month bar in favour of a plaintiff whose ignorance of a cause of action within the two month period was caused or contributed to by the defendant is unreasonable thus rendering the section constitutionally invalid.”¹⁴⁴

1.63 Costello J. noted that where a very short time-limit is imposed, “considerable hardship” may be caused to a plaintiff who is deprived of a judicial remedy before he knew he had a cause of action. He noted that where the defendant’s wrong-doing causes the plaintiff’s ignorance of his rights during the short limitation period, there would have to be “very compelling reasons indeed”

¹⁴⁰ *Brady v Donegal Co. Council* [1989] ILRM 282.

¹⁴¹ See *Cahill v Sutton* [1980] IR 269, 288.

¹⁴² *Brady v Donegal County Council* [1989] ILRM 282.

¹⁴³ See *Cahill v Sutton* [1980] IR 269, at 273-274.

¹⁴⁴ *Brady v Donegal County Council* [1989] ILRM 282, 288.

to justify such a rigorous limitation on the exercise of a constitutionally protected right.¹⁴⁵ He noted that the public interest must be a factor to be weighed in the balance and proceeded to balance the respective interests as follows:-

“Certainly the public interest would not be quite as well served by a law with the suggested saver as by the present law, but the loss of the public interest by the proposed modification would be slight while the gain in the protection of the plaintiff’s constitutionally protected rights would be very considerable.”¹⁴⁶

1.64 He therefore concluded in respect of section 82(3A) that “being unreasonable it is unconstitutional”.¹⁴⁷ Giving something of a warning, he held:-

“Had attention been paid to what the Supreme Court [in *Cahill v Sutton*] said about the 1957 Limitation Act and steps taken to amend it I am sure that other statutes containing limitation periods such as the one I am considering would have been looked at also and their defects remedied.”¹⁴⁸

1.65 The respondents appealed to the Supreme Court, which allowed an appeal from the High Court’s ruling on constitutionality, and remitted the entire action for retrial by the High Court, ordering that the issues of fact should be tried before the constitutional issue. The Supreme Court noted that if the plaintiffs’ case transpired not to be exceptional, following the trial and a decision on an issue of fact, the plaintiffs would not have *locus standi* to challenge the validity of section 82(3A).

(ii) S. 50, Planning and Development Act 2000, as amended

1.66 Section 50 of the *Planning and Development Act 2000*, as amended,¹⁴⁹ was drafted in the light of growing criticism of section 82(3A) of the *Local Government (Planning and Development) Act 1963*. An eight-week time period now applies to the bringing of judicial review proceedings in respect of planning decisions, commencing on the date of the decision of the planning authority.¹⁵⁰ In order to comply with the time-limit, it is sufficient that the proceedings be issued and served on all of the statutory parties within the prescribed period; it is not necessary for the leave application to have been

¹⁴⁵ *Ibid* at 288.

¹⁴⁶ *Ibid* at 289.

¹⁴⁷ *Ibid* at 289.

¹⁴⁸ *Brady v Donegal County Council* [1989] ILRM 282, 289.

¹⁴⁹ See section 13, *Planning and Development (Strategic Infrastructure) Act 2006*.

¹⁵⁰ Sections 50(6) and (7), *Planning and Development Act 2000*, as amended.

moved before the High Court, or even listed for hearing.¹⁵¹ In addition, the Courts must be satisfied that the applicant for judicial review has a “substantial interest” in the matter that is the subject of the judicial review application.¹⁵²

1.67 Section 50(4) was discussed by the Supreme Court in *Harding v Cork County Council*.¹⁵³ Kearns J. held that the introduction of that section has significantly heightened the bar for objectors or aggrieved persons who now seek to bring judicial review proceedings. He continued as follows:-

“These are onerous conditions which can only be seen as restricting in a significant way the citizen’s right of access to the court. Perhaps it would be more accurate to say that the citizen’s entitlement to a judicial remedy is significantly circumscribed by the Act of 2000. Access to court *per se* is not denied, but an applicant has numerous hurdles to clear before obtaining leave.”¹⁵⁴

1.68 Kearns J. was of the view that section 50 was intended “to restrict the entitlement to bring court proceedings to challenge decisions of planning authorities”, and he noted that there is “an obvious public policy consideration” driving this “restrictive” provision, which he expressed as follows:-

“Where court proceedings are permitted to be brought, they may have amongst their outcomes not merely the quashing or upholding of decisions of planning authorities but also the undesirable consequences of expense and delay for all concerned in the development project as the court process works its way to resolution. The [*Planning and Development Act 2000*] may thus be seen as expressly underscoring the public and community interest in having duly authorised development projects completed as expeditiously as possible.”

1.69 The eight-week limitation period set by section 50 is not absolute: the High Court may extend time, but only if the Court is satisfied that:-

- (a) there is good and sufficient reason for doing so, and

¹⁵¹ Garrett Simmons *Planning and Development Law* (2nd ed, 2007) at §11-53.

¹⁵² Section 50(4), *Planning and Development Act 2000*, as amended.

¹⁵³ *Harding v Cork County Council* [2008] IESC 27.

¹⁵⁴ *Harding v Cork County Council* [2008] IESC 27.

- (b) the circumstances that resulted in the failure to make the application for leave within the period do provided were outside the control of the applicant for the extension.¹⁵⁵

1.70 The ability of the High Court to extend time under section 50 remedies the defect in section 82 of the *Local Government (Planning and Development) Act 1963*. In *Kelly v Leitrim County Council*, Clarke J. remarked as follows respect to section 50:-

“The period involved, being one of eight weeks, while short is not unduly harsh. This is so, in particular, in cases where it is likely, as here, that an applicant will already have the benefit of expert professional advice prior to the commencement of the time running by the employment of appropriate professionals in the planning process which led to the decision sought to be challenged.”¹⁵⁶

1.71 The Courts have adopted a particularly strict view with respect to the time-limit imposed by section 50. In *Casey v An Bord Pleanála*, the applicant was outside the eight-week period by some 17 hours, which it was submitted was a simple computational error in calculating 8 weeks which previously was two months. Murphy J. refused to grant an extension of time, stating as follows:-

“[I]t would seem to go against the statutory provisions and precedents in relation to judicial review in planning matters to allow an applicant to circumvent them by allowing further time to substantiate grounds unless there are good and sufficient reasons to do so. It does not appear to the Court that the reasons given for non involvement and for delay amount to sufficient reasons for the Court to extend time.”¹⁵⁷

1.72 In *Kelly v Leitrim County Council*, Clarke J. refused to extend time owing to a delay of 19 days in issuing and serving the proceedings; he considered that 19 days was significant in relation to a period of eight weeks, having regard to the necessity to bring finality to all planning matters. He summarised his position as follows:-

¹⁵⁵ Section 50(8), *Planning and Development Act 2000*, as amended by section 13, *Planning and Development (Strategic Infrastructure) Act 2006*. Part (b) is new, it did not form part of the original section 50 procedures, while part (a) is now phrased in negative terms by comparison with Order 84, rule 21 of the *Rules of the Superior Courts 1986*.

¹⁵⁶ See *Kelly v Leitrim County Council* [2005] 2 IR 404, 415. This was prior to the amendment of section 50 by section 13 of the *Planning and Development (Strategic Infrastructure) Act 2006*.

¹⁵⁷ *Casey v An Bord Pleanála* [2004] 2 IR 296.

“[T]here is ... a clear legislative policy ... which requires that, irrespective of the involvement of the rights of third parties, determinations of particular types should be rendered within a short period of time as part of an overall process of conferring certainty on certain categories of administrative or quasi judicial decisions. Therefore while it may well be legitimate to take into account the fact that no third party rights are involved that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account.”

1.73 In *Openneer v Donegal County Council*,¹⁵⁸ Macken J. accepted that the time limit set out in section 50 is “a very strict time limit, which, save for exceptional circumstances, operates as a type of guillotine” but she noted that “the wording of s. 50 requires only that there be “good and sufficient” reasons, not necessarily exceptional circumstances”. That notwithstanding, she refused to grant an extension of time, noting thus:-

“It is very understandable why such time limits are imposed by the legislation. Planning matters are of their very nature, when they include a right in third parties to make submissions, such as in the planning regime, such that those securing permission may wish to rely on the rights granted, as soon as possible after the expiry of a statutory period within which a challenge might have been made but was not, in the certain belief that the right “final”. It is one of the very reasons why the challenge must be made within the time limit provided for, as otherwise the party with the right vesting in him arising from the permission granted might be in limbo for an inordinate period of time, and the permission would lack legal certainty.”¹⁵⁹

(iii) S. 82(3B), Planning and Development Act 1963

1.74 Although repealed by the *Planning and Development Act 2000*,¹⁶⁰ the provisions of the *Local Government (Planning and Development) Acts 1963 to 1999* continue to apply with respect to planning decisions that were received by the planning authority or An Bord Pleanála before the repeal of those Acts.¹⁶¹ In that context, the constitutionality of section 82(3B) of the 1963 Act, as amended,

¹⁵⁸ *Openneer v Donegal County Council* [2005] IEHC 156.

¹⁵⁹ *Openneer v Donegal County Council* [2005] IEHC 156. See also *Harrington v An Bord Pleanála* [2005] 1 IR 388; *Lennon v Cork City Council* [2006] IEHC 438.

¹⁶⁰ Section 264, *Planning and Development Act 2000*.

¹⁶¹ Section 265(4) . .

was considered by the Supreme Court in 2004.¹⁶² Section 82 was amended in 1992 but the time-limit remained the same and no “saver” was introduced.¹⁶³

1.75 In *White v Dublin City Council*, Denham J. noted that more lengthy limitation periods are laid down for civil actions between private persons or bodies but that there are “obvious distinctions” between such common law actions and judicial review proceedings.¹⁶⁴ She stressed that the “imperative of certainty in administrative decisions” must be weighed against the “equally important” right to litigate.¹⁶⁵ She cited section 50 of the *Planning and Development Act 2000* as “a useful and relevant indicator of what may be considered fair and just in such an enactment.”¹⁶⁶ She noted that it is “not necessarily unconstitutional” for a limitation period to be absolute where the wrong was not reasonably discoverable within the longer time allowed but she noted that anxiety, worry and cost for the defendant are “important elements in those cases”.¹⁶⁷

1.76 Denham J. ultimately found the absolute two-month time-limit under section 82(3B) to be repugnant to the right of access to the courts under Article 40.3 of the Constitution, given that that the applicants were “deprived of any genuine opportunity to challenge the legality of the decision within the permitted time.”¹⁶⁸ She ruled that in exercising its discretion to exclude any power to extend time for cases such as the present, the legislature undermined or compromised a substantive right guaranteed by the Constitution.¹⁶⁹ She added *obiter* that the Oireachtas might be entitled to fix an absolute limitation period of

¹⁶² *White v Dublin City Council* [2004] 1 IR 545.

¹⁶³ Section 19(3), *Local Government (Planning and Development) Act 1992* substituted two subsections, 3A and 3B, for the existing sub-sections under the 1963 Act. Under the new section 82(3B), an application for leave to apply for judicial review in respect of planning decisions made either by a planning authority or An Bord Pleanála had to be made within two months of the date on which the decision is given.

¹⁶⁴ *White v Dublin City Council* [2004] 1 IR 545, 573.

¹⁶⁵ *Ibid* at 573.

¹⁶⁶ *Ibid* at 574.

¹⁶⁷ *Ibid* at 573.

¹⁶⁸ *Ibid* at 575.

¹⁶⁹ *Ibid* at 575.

a short duration where persons to whom it applied would in fact have a full opportunity to bring proceedings within that time limit.¹⁷⁰

1.77 After the Supreme Court decision in *White*, the High Court in *Jerry Beades Construction Ltd v Dublin Corporation*¹⁷¹ was obliged to fall back on the *Rules of the Superior Courts 1986*, in the absence of a statutory time-limit. McKechnie J. assessed whether the applicant had acted “promptly”, in accordance with Order 84, rule 21 of the *Rules of the Superior Courts 1986*.

(b) Asylum and Immigration Cases

1.78 An even shorter time-limit applies to the commencement of judicial review proceedings in respect of certain decisions of the Refugee Applications Commissioner, the Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform during the refugee determination process and the deportation process.¹⁷² In such cases, a leave application must be made, in accordance with section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000*, within the following limits:-

“[...] within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made”.

1.79 This formulation is similar to that contained in section 50 of the *Planning and Development Act 2000*, but the time-limit is much shorter. Moreover, the 14-day limit applies from the date on which the applicant is notified of the specific decision or action that he or she seeks to challenge. Like section 50, it contains a “saver” allowed for the extension of the limitation period. It might be surmised that this “saver” was enacted to ensure the constitutionality of the provision in the light of the warning given by Costello J. in *Brady v Donegal County Council*.¹⁷³

1.80 Section 5 (and section 10) of what became the Act of 2000 was referred to the Supreme Court by the President pursuant to Art. 26.2.1° of the Constitution for a ruling as to its constitutionality. In *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*¹⁷⁴ it was argued that while there was an

¹⁷⁰ *Ibid* at 574-5.

¹⁷¹ *Jerry Beades Construction Ltd v Dublin Corporation* [2005] IEHC 406.

¹⁷² See sections 5(1)(a)-(n), *Illegal Immigrants (Trafficking) Act 2000*.

¹⁷³ *Brady v Donegal County Council* [1989] ILRM 282, 289.

¹⁷⁴ *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

express provision allowing for an extension of time, this was not sufficient to compensate for the restriction imposed by the 14-day time-limit on the constitutional right of access to the courts. The Supreme Court acknowledged that asylum seekers face special problems that may make it particularly difficult for them to seek judicial review of decisions affecting them but the Court was nevertheless satisfied that the discretion afforded to the courts to extend time was sufficiently wide to enable persons who experience language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, to have sufficient access to the courts.¹⁷⁵ The Supreme Court observed that the objectives of the limitation period, as inferred from the provisions of the Bill, were based on the need for the expeditious determination of such applications:-

“There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible.”¹⁷⁶

1.81 The Supreme Court was also satisfied that:-

“[...] the early establishment of the certainty of the decisions in question is necessary in the interests of the proper management and treatment of persons seeking asylum or refugee status in this country. The early implementation of decisions duly and properly taken would facilitate the better and proper administration of the system governing seekers of asylum for both those who are ultimately successful and ultimately unsuccessful.”¹⁷⁷

1.82 The Supreme Court reiterated in *S v Minister for Justice, Equality and Law Reform* that the stringent 14-day time limit is balanced by the courts’ discretion to extend time where there is good and sufficient reason to do so.¹⁷⁸

(c) Public Procurement Cases

1.83 Order 84A of the *Rules of the Superior Courts 1986* was inserted by the *Rules of the Superior Courts (No. 4) (Review of the Award of Public Contracts) 1998*,¹⁷⁹ and provides as follows:

¹⁷⁵ *Ibid* at 394.

¹⁷⁶ *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 392.

¹⁷⁷ *Ibid* at 392.

¹⁷⁸ *S v Minister for Justice Equality and Law Reform* [2002] 2 IR 163.

¹⁷⁹ S.I. No. 374 of 1998.

"An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period."

1.84 As has been noted by the Supreme Court,¹⁸⁰ the time constraints in Order 84A reflect the objectives in law and policy of the European Union under a series of Council Directives relating to the review of public contract award procedures. The High Court has remarked that the discretion to extend the shortened time limits under provisions such as Order 84A was "doubtless" to meet constitutional concerns such as those addressed in *Brady v Donegal County Council* and other cases in which constitutional challenges were brought to such short time limits.¹⁸¹

(d) Order 84, rule 21: The Requirement to move "Promptly"

1.85 Under Order 84, rule 21 of the *Rules of the Superior Courts 1986*, an application for leave to apply for judicial review must be made as follows:-

"[...] promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."¹⁸²

1.86 Thus, the Courts can refuse to grant leave to seek judicial review even where the applicant has moved first within the outer limit of three or six months, if satisfied that in any event the applicant failed to move "promptly". It has been suggested that this reflects the pre-1986 onus on applicants to move "with dispatch".¹⁸³ The rule does not operate in the same way as a limitation period, although it does impose "a preliminary obligation to proceed with dispatch".¹⁸⁴

¹⁸⁰ *Dekra Éireann Teo v Minister for the Environment* [2003] 2 IR 270.

¹⁸¹ See *Kelly v Leitrim County Council* [2005] 2 IR 404, 411.

¹⁸² Order 84, rule 21(1), *Rules of the Superior Courts 1986*, as amended.

¹⁸³ See *The State (Cussen) v Brennan* [1981] IR 181. In that case, a period of four months from the date of the impugned decision was regarded as not fulfilling that criterion. See further *K.S.K. Enterprises Ltd. v An Bord Pleanála* [1994] 2 IR 128; *Slattery's Ltd v Commissioner of Valuation and Others* [2001] 4 IR 91; *Dekra Eireann Teo v Minister for the Environment* [2003] IESC 25.

¹⁸⁴ *De Róiste v Minister for Defence* [2001] 2 ILRM 241, 266.

1.87 It is noteworthy that in *Marshall v Arklow Town Council*,¹⁸⁵ Peart J. held that if proceedings are commenced within the eight week period provided for under section 50 of the *Planning and Development Act 2000*, as amended, the Court cannot refuse leave because it considers that the applicant did not move promptly within the eight weeks allowed. Although he acknowledged that the three and six month time limits set out in Order 84, rule 21 are outer limits only, he found that different considerations arise where the applicant is mandated to bring an application within eight weeks:-

“It must be presumed that the legislature was aware of the provisions of O. 84, r. 21(1) and decided that in planning matters there was a need to ensure that applications were commenced within a shorter time than either three or six months, as the case may be, but it cannot be said that even though an application is brought within that period of eight weeks, the court could nevertheless refuse leave because it regarded the applicant as not having moved promptly within the eight week period. That is a distinction, even though the question of prejudice to the notice parties is still a very relevant one within the context of any assessment of the delay on the part of an applicant beyond that eight week period.”¹⁸⁶

(5) *Balancing the Various Rights and Interests*

1.88 Under Article 40.3.2° of the Constitution, the State is expressly obliged to protect the rights of every citizen from unjust attack, by its laws, and to vindicate such rights “in the case of injustice done”. This is qualified, however, by the words “as best it may.” The Supreme Court held in *Ryan v Attorney General* that this “implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good.”¹⁸⁷ Thus, the exercise of personal rights is not unlimited¹⁸⁸ and the curtailment thereof is not *per se* unconstitutional;¹⁸⁹ the exercise of constitutional rights may be restricted by the constitutional rights of others, and by the requirement of the common good.¹⁹⁰

¹⁸⁵ *Marshall v Arklow Town Council* [2006] 1 ILRM 150.

¹⁸⁶ *Marshall v Arklow Town Council* [2006] 1 ILRM 150.

¹⁸⁷ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 372.

¹⁸⁸ *Ryan v Attorney General* [1965] IR 294, 312-313.

¹⁸⁹ *Murphy v Greene* [1990] 2 IR 566, 572.

¹⁹⁰ *Ryan v Attorney General* [1965] IR 294, 312-313: “When dealing with controversial social, economic and medical matters on which it is notorious views

1.89 The Constitution also specifically provides for the delimitation of the right to private property. Article 43.2.1° recognises that in a civil society, the exercise of the right ought to be regulated by “the principles of social justice”. Article 43.2.2° allows the State to delimit the exercise of the right by law, with a view to reconciling the exercise of the right with “the exigencies of the common good”. Clearly, therefore, it is not unconstitutional, *per se*, to impose limitation periods on civil actions concerning property rights. Such limitation periods must, however, be assessed in light of the protection afforded by the Constitution.

1.90 The weighing of the relevant considerations has been held by the Supreme Court to be “quintessentially a matter for the judgement of the legislator”¹⁹¹ and as such, is “a matter of policy and discretion”.¹⁹² Nevertheless, the curtailment of constitutional personal rights is subject to the scrutiny of the Superior Courts. The Courts may intervene where the balance of rights and interests achieved by the Oireachtas is oppressive to all or some citizens, or where there is “no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.”¹⁹³

1.91 The key consideration in the courts’ assessment will be reasonableness.¹⁹⁴ The courts will consider whether the balance of interests achieved is “unduly restrictive or unreasonable”,¹⁹⁵ or “unreasonably or unjustly impose hardship”,¹⁹⁶ and whether it is “supported by just and reasonable policy decisions.”¹⁹⁷ While it is accepted that all limitation periods will potentially impose some hardship on some individual, the extent and nature of such hardship must not be “so undue and so unreasonable” as to make it constitutionally flawed, having regard to the proper objectives of the relevant legislation.¹⁹⁸ The reasonableness of limitation periods will be assessed “in the

change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good”.

¹⁹¹ *White v Dublin City Council* [2004] 1 IR 545, 568.

¹⁹² *In re the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360, 393.

¹⁹³ *Ryan v Attorney General* [1965] IR 294, 312-313.

¹⁹⁴ *Murphy v Greene* [1990] 2 IR 566, 572.

¹⁹⁵ *O'Dowd v North Western Health Board* [1983] I.L.R.M. 186, 190.

¹⁹⁶ *Tuohy v Courtney* [1994] 3 IR 1, 48.

¹⁹⁷ *Ibid* at 50.

¹⁹⁸ *Ibid* at 48. The Court concluded that the absolute character of the six year limitation period laid down by s. 11(2)(a) of the *Statute of Limitations 1957* did not

general circumstances of the ordinary life of this country prevailing at the time when the enactment comes into force” but the hypothetical situation of a prospective litigant having no knowledge of a statutory period of limitation is not relevant to the assessment of the reasonableness of that limitation period.¹⁹⁹

1.92 It is a well established principle of statutory interpretation that any legislative exception to a constitutional provision must be strictly construed, and must not be availed of except where it was essential to do so.²⁰⁰ Limitation periods, which necessarily constrict the constitutional personal right to litigate, will therefore be strictly construed.

1.93 A useful summation was provided in *Cahill v Sutton*,²⁰¹ where Finlay CJ suggested that in the case before him, he should firstly examine the *Statute* against the background of the circumstances of the ordinary life in the country at the time the *Statute* was enacted, to discover whether it provided a reasonable or unreasonable time limit, and then examine it in the light of the balance which the Oireachtas was required to hold between the rights of prospective plaintiffs and prospective defendants with a view to seeing whether the limitation period was a reasonable one.²⁰²

D The European Convention on Human Rights

1.94 Ireland signed the European Convention on Human Rights (“the Convention”) on November 4 1950, and ratified it on February 25 1953. The *European Convention on Human Rights Act 2003* incorporated the Convention

render it unconstitutional. It observed that the “period of six years is, objectively viewed, a substantial period” and that existing provisions for extension in cases of disability, part-payment, fraud and mistake “constitute a significant inroad on the certainty and finality provided by the Act.”

¹⁹⁹ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 366.

²⁰⁰ *In re R. Ltd* [1989] IR 126. The Court was considering the interpretation of section 205(7) of the *Companies Act 1963* which permitted, under certain circumstances, the hearing of an application pursuant to that section *in camera*. The Court had regard to Article 34 of the Constitution, which specifies that the administration of justice be in public, subject to exceptions prescribed by law.

²⁰¹ *Cahill v Sutton* [1980] IR 269.

²⁰² *Ibid* at at 273-274. Finlay CJ felt obliged to follow the approach adopted in *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334 rather than the approach adopted in *O'Brien v Keogh* [1972] IR 144. The approach taken by Finlay CJ was followed by Costello J. in *Brady v Donegal County Council* [1989] ILRM 282.

into Irish law. Section 2(1) of the 2003 Act provides that the Irish courts must interpret and apply any statutory provision or rule of law in a manner compatible with the State's obligations under the Convention provisions, "so far as is possible, subject to the rules of law relating to such interpretation and application". This duty applies, pursuant to section 2(2) of the 2003 Act, to any statutory provision or rule of law in force immediately before the passing of the 2003 Act or any such provision coming into force since then.

1.95 Since the 2003 Act came into force on 31 December 2003, reliance may now be placed on Article 6 of the Convention in domestic proceedings. The position of the Convention in domestic law was put succinctly by Gilligan J. as follows:-

"The situation with regard to the European Convention on Human Rights is that Article 6 was brought into force of domestic law by the European Convention of Human Rights Act, 2003 on 31st December, 2003, which provides for a fair and public hearing within a reasonable time. The Act of 2003 operates prospectively only from the date of the coming into force of the European Convention on Human Rights Act, 2003 but I am satisfied, having regard to the available jurisprudence, that the European Convention of Human Rights is an extra factor to be added into consideration by this Court but subject to the application of existing Irish law and jurisprudence."²⁰³

(1) Right of Access to the Courts

1.96 Article 6(1) of the Convention reads, in the relevant part, as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and partial tribunal established by law."

1.97 Article 6(1) embodies the "right to a court". One aspect of this right is a right of access to the courts, which comprises the right to institute proceedings before a court in civil matters.²⁰⁴ This right seeks "to protect the individual concerned from living too long under the stress of uncertainty" and "to ensure that justice is administered without delays which might jeopardise its effectiveness and credibility."²⁰⁵

²⁰³ *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 296.

²⁰⁴ *Stubbings v United Kingdom* (1997) 23 EHRR 213, § 50.

²⁰⁵ *Jacobs & White The European Convention on Human Rights* (4th ed OUP 2006) at 187.

1.98 It is well accepted within the jurisprudence of the European Court of Human Rights that the Convention is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.²⁰⁶ Article 6(1) therefore implies an effective right of access to the court and access to the courts must mean access in fact as well as in principle.²⁰⁷

1.99 That notwithstanding, the right of access is not absolute, and it does not prohibit the imposition of limitation periods *per se*.²⁰⁸ The European Court of Human Rights has acknowledged that limitation periods are a common feature of the domestic legal systems of the Contracting States. The Court has stated as follows, acknowledging the merits of limitation periods:

“They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.”²⁰⁹

1.100 The Court has also acknowledged that the interest of good administration of justice is served by the imposition of time limits within which prospective proceedings must be instituted, that time limits may be final, and that there can be no possibility of instituting proceedings even when new facts arise after the expiry of the time limit imposed.²¹⁰

1.101 The European Court of Human Rights has noted a lack of uniformity among the member State of the Council of Europe as to the length of civil limitation periods and the date from which those periods run.²¹¹ It has observed that in many States, the limitation period begins to run from the date of accrual, whereas in others it runs from the date of knowledge. The date of knowledge test is not, therefore is commonly accepted in European States.²¹² The Court has applied a margin of appreciation to the manner in which Contracting States organise their limitation periods. In one case, the Court showed deference to

²⁰⁶ *Airey v Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12, §24.

²⁰⁷ *Golder v United Kingdom* (1979–80) 1 EHRR 524.

²⁰⁸ See *ibid* at § 38.

²⁰⁹ *Stubbings v United Kingdom* (1997) 23 EHRR 213, § 51.

²¹⁰ *X v Sweden* (app. No 9707/82, decision of 6th October, 1982).

²¹¹ *Stubbings v United Kingdom* (1997) 23 EHRR 213, § 54.

²¹² *Ibid* at § 54.

the UK system of limitation, noting that the legislature had devoted a substantial amount of time and study to the consideration of its limitation law.²¹³

1.102 In applying the margin of appreciation, the European Court of Human Rights has noted that the right of access is not absolute and may be subject to limitations.²¹⁴ By its very nature, litigation calls for regulation by the state.²¹⁵ Limitations on the right of access must be for a legitimate aim and must not transgress the principle of proportionality.²¹⁶ There must, therefore, be “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”²¹⁷ Moreover, the Court has held that while restrictions may be placed on the right of access to the courts by way of limitation period, such restrictions cannot function but to such a degree as to impair the essence of the right of access.²¹⁸ In other words, “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”²¹⁹

(2) Right to a Hearing within a Reasonable Time

1.103 Article 6(1) of the Convention guarantees that in the determination of his civil rights and obligations, everyone is entitled to a hearing “within a reasonable time”.²²⁰ The European Court of Human Rights has stressed that “it is for the State to organise its legal system as to ensure the reasonably timely determination of legal proceedings”.²²¹ Thus, Contracting States must provide mechanisms to ensure that hearings are held within a reasonable time. It is for the State to decide what mechanisms to adopt - whether by way of increasing the numbers of judges, or by automatic time-limits and directions, or by some other method.²²² The Court has held that if a State lets proceedings continue

²¹³ *Ibid* at § 55.

²¹⁴ *Stubbings v United Kingdom* (1997) 23 EHRR 213 at § 50.

²¹⁵ *Ibid* at § 50.

²¹⁶ *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at §§ 57-59.

²¹⁷ *Stubbings v United Kingdom* (1997) 23 EHRR 213 at § 50.

²¹⁸ *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at § 57.

²¹⁹ *Ibid* at § 57.

²²⁰ See generally Delany “The Obligation on the Courts to Deal with Cases within a ‘Reasonable Time’” (2004) 22 ILT 249.

²²¹ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 44.

²²² *Price and Lowe v United Kingdom*, nos. 43185/98 and 43186/98, judgment of July 29 2003, [2003] ECHR 409 at § 23.

beyond the “reasonable time” prescribed by Article 6(1) without doing anything to advance them, it will be responsible for the resultant delay.²²³

1.104 It is insufficient, for the purposes of Article 6(1), for a State to place an onus on litigants to proceed with due expedition. The Court has consistently held that “a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time”.²²⁴ With regard to the conduct of the responsible national authorities, the Court has noted the following:

“[W]hether or not a system allows a party to apply to expedite proceedings, the courts are not exempted from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities”.²²⁵

(a) What length of time is “Reasonable”?

1.105 The European Court of Human Rights has consistently held that the ‘reasonableness’ of the length of proceedings will be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law.²²⁶

1.106 The UK Privy Council has noted that the threshold of unreasonableness is “a high one, not easily crossed.”²²⁷ According to the jurisprudence of the European Court of Human Rights, the case must be looked at from a procedural, factual and legal point of view.²²⁸ Of particular relevance

²²³ *Ibid* at § 23.

²²⁴ *Price and Lowe v United Kingdom*, nos. 43185/98 and 43186/98, judgment of July 29 2003, [2003] ECHR 409 at § 23.

²²⁵ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 47.

²²⁶ See e.g. *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422 at § 33; *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 44; *O’Reilly and Anor v Ireland*, no. 54725/00, judgment of October 29 2004, [2006] 40 EHRR 40 at § 30.

²²⁷ *Dyer v Watson* [2002] 3 WLR 1488, 1508 (Privy Council).

²²⁸ *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422 at § 33.

are the complexity of the case,²²⁹ the importance of what is at stake for the applicant in the litigation,²³⁰ and the conduct of the applicant and of the relevant authorities.²³¹ The Court has held that “applicants are entitled to make use of all procedural steps relevant to them but they should do so with diligence”²³² and that applicants “must bear the consequences when such procedural applications result in delay.”²³³ An applicant is “required to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings. He is under no duty to take action which is not apt for that purpose”.²³⁴

1.107 The European Court of Human Rights has held that the duty under Article 6 §1 applies to that “all stages of legal proceedings” for the determination of civil rights and obligations.²³⁵ The Court will take not only into account the length of time involved starting with the issue of proceedings but also all stages subsequent to judgment on the merits.²³⁶ This will include taxation proceedings and bankruptcy proceedings, which as both seen as a further stage in the substantive proceedings.²³⁷ The time-limits given for filing documents are not deducted from the total length of the delay, but are not counted as delay attributable to the authorities.²³⁸ The European Court of Human Rights will,

²²⁹ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 44; *Price and Lowe v United Kingdom*, nos. 43185/98 and 43186/98, judgment of July 29 2003, [2003] ECHR 409 at § 20.

²³⁰ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at §§ 44 and 47; *Price and Lowe v United Kingdom*, nos. 43185/98 and 43186/98, judgment of July 29 2003, [2003] ECHR 409 at § 20.

²³¹ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 44; *Price and Lowe v United Kingdom*, nos. 43185/98 and 43186/98, judgment of July 29 2003, [2003] ECHR 409 at § 20.

²³² *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422, § 35.

²³³ *Ibid* at § 35.

²³⁴ *Union Alimentara Sanders SA v Spain*, no. 11681/85, (1989) 12 EHRR 24, judgment of July 7 1989 at § 35.

²³⁵ *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422 at § 31.

²³⁶ *Ibid* at § 30-31.

²³⁷ *Ibid* at § 31.

²³⁸ *Mitchell and Holloway v United Kingdom*, no. 44808/98, judgment of December 17 2002, [2003] 36 EHRR 52 at § 50.

however, deduct any periods of time during which there were no proceedings before the relevant domestic courts.²³⁹

1.108 Criticism has been levelled by the European Court of Human Rights in respect of court management. Following the finding of a violation of Article 6(1) in respect of the absence of a system of court management in England and Wales,²⁴⁰ extensive case management procedures have now been introduced in those jurisdictions.²⁴¹ Steps have also been taken in respect of case management in Ireland, following the 28th Interim Report of the Committee on Court Practice and Procedure.²⁴² Order 63A of the *Rules of the Superior Courts 1986*, which came into force in 2004,²⁴³ sets out detailed case management procedures for commercial cases. This Rule is designed to put pressure on parties to expedite proceedings. Case management procedures have also been introduced in respect of judicial review proceedings.²⁴⁴

1.109 A further area in which the European Court of Human Rights has found there to be unreasonable delay is where there is a backlog of cases pending before the Courts. The Court has found that the fact that such backlog situations have become commonplace does not justify the consequently excessive length of proceedings.²⁴⁵ No liability will arise under Article 6(1) in respect of a temporary backlog of court business so long as the State takes “appropriate remedial action with the requisite promptness”, but where a critical backlog situation persists and it becomes clear that the expedients taken were insufficient to clear the backlog, “the State must take other, more effective action”.²⁴⁶

²³⁹ *Ibid* at § 50.

²⁴⁰ *Mitchell and Holloway v United Kingdom*, no. 44808/98, judgment of December 17 2002, [2003] 36 EHRR 52 at § 58.

²⁴¹ Delany “The Obligation on the Courts to Deal with Cases within a ‘Reasonable Time’” (2004) 22 ILT 249.

²⁴² Committee on Court Procedure and Practice 28th *Interim Report - Court Rules Committee* (September 2003) (available at www.courts.ie). See further Buckley “Implementation of a Modern Case Management System” (2005) 23 ILT 27.

²⁴³ *Rules of the Superior Courts (Commercial Proceedings) 2004* (SI No 2 of 2004).

²⁴⁴ This followed the recommendations in the Commission’s *Report on Judicial Review Procedure* (LRC 71-2004).

²⁴⁵ *Union Alimentara Sanders SA v Spain*, no. 11681/85, [1989] 12 EHRR 24, judgment of July 7 1989 at § 40.

²⁴⁶ *Ibid* at §40.

(b) Findings against the Irish State

1.110 In a number of cases, Ireland has been found to be in violation of Article 6(1) of the Convention owing to the failure of the State to prevent excessively lengthy legal proceedings.

1.111 In *Doran v Ireland*,²⁴⁷ the European Court of Human Rights penalised Ireland for its failure to comply with the ‘reasonable time’ requirement. The applicants had initiated their domestic claim in July 1991. The taxation certificate was signed by the Taxing Master of the High Court in December 1999, thereby ending the proceedings. The proceedings had lasted nearly 8 ½ years. When the Supreme Court gave judgment on the applicants’ appeal in March 1998, the proceedings had already been in being for over 6 ½ years. The European Court of Human Rights ruled that in these circumstances, “particular diligence” was required of the judicial authorities that were subsequently concerned with the proceedings to ensure the speedy determination of the outstanding issues namely, the assessment and apportionment of damages by the High Court and the applicants’ costs.²⁴⁸

1.112 The Court did not consider the case to be significantly complex from an administrative or factual point of view and although there was a “legal novelty”, this could not explain the length of the proceedings.²⁴⁹ Considering the conduct of the State, the Court rejected the explanation proffered by the Irish government that the President of the High Court, who had begun hearing the case, was held up by his commitments as chair of a domestic Tribunal.²⁵⁰

1.113 Likewise, the State was found to be in breach of Article 6(1) in the case of *McMullen v Ireland*.²⁵¹ The applicant’s case had begun some 16 years previously and was still continuing as a determination on the taxation of costs remained outstanding. The European Court of Human Rights found that the

²⁴⁷ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 48. The State was ordered to pay damages of €26,000 to the applicants.

²⁴⁸ *Ibid* at § 48.

²⁴⁹ *Ibid* at § 45.

²⁵⁰ *Ibid* at § 46. It was noted that “the applicants diligently pursued the timely resolution of the proceedings issued by them”, had performed “timely completion of their submissions and their numerous motions to the court” and were “tenacious in their pursuit of informal means of speeding up their proceedings”. They had approached the Taoiseach and the Tánaiste, who in turn had received assurances from the Attorney General and the Department of Justice.

²⁵¹ *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422. The State was ordered to pay €8,353.26 to the applicant.

conduct of the applicant contributed “in no small part” to the delay in the proceedings.²⁵² The period of time dedicated to the applicant’s bankruptcy proceedings concerning was entirely attributable to the applicant.²⁵³ The applicant failed to pay the costs established after the issuance of the taxation certificate.²⁵⁴ Nevertheless, the Court ruled that the applicant’s conduct did not, alone, explain their overall length of the proceedings.²⁵⁵ The Court considered the State to be responsible for several periods of delay, comprising a year between the last date of High Court hearings and the delivery of the judgment of the High Court; almost two years between the applicant’s confirmation that all appeal documents had been filed and the first hearing date for the appeal; and six months for the Supreme Court to re-constitute and fix a hearing date for the appeal.²⁵⁶

1.114 In *O’Reilly and Ors v Ireland*, the State was again found to be in violation of Article 6(1) of the Convention.²⁵⁷ The applicants had brought proceedings in 1994 seeking an order of *mandamus* compelling a local authority to repair the road on which they lived. The proceedings took nearly four years and eleven months, ending only in June 1999 with the final orders of the Supreme Court.²⁵⁸ The European Court of Human Rights found that none of the delay was attributable to the applicants, but that two specific and lengthy delays were attributable to the domestic authorities, namely one year and four months spent waiting for the High Court to deliver its judgment, and a material delay of some three months in the appeal hearing, while the case was adjourned to accommodate a more urgent case.²⁵⁹ As for what was at stake for the applicants, the Court noted that while the repair works were completed in 1998, the “not insignificant issue” of costs remained undetermined.²⁶⁰

²⁵² *McMullen v Ireland*, no. 42297/98, judgment of July 29 2004, [2004] ECHR 422 at § 37.

²⁵³ *Ibid* at § 31.

²⁵⁴ *Ibid* at § 36.

²⁵⁵ *Ibid* at § 37.

²⁵⁶ *Ibid* at § 39.

²⁵⁷ *O’Reilly and Anor v Ireland*, no. 54725/00, judgment of October 29 2004, [2006] 40 EHRR 40. The State was ordered to pay €1,400 to the applicants.

²⁵⁸ *Ibid* at § 31.

²⁵⁹ *Ibid* at § 32-33.

²⁶⁰ *Ibid* at § 34.

1.115 A further violation of Article 6(1) was found in *Barry v Ireland*, which concerned a criminal prosecution.²⁶¹ The applicant, then a doctor, was arrested in 1997 and charged with sexual assault of a former patient. He was later charged with 237 offences of a sexual nature concerning 43 complainants.²⁶² He issued judicial review proceedings seeking to have his prosecution abandoned, and sought discovery. The prosecution did not proceed until eight years later, in 2005. At the time of the decision of the European Court of Human Rights in 2005, the proceedings in question were not yet completed, and had been in train for 10 years and 4 months. The Court deemed the date on the first search of his clinic, home and consulting rooms was carried out (June 2005) was the date from which the ‘reasonableness’ of proceedings would be assessed.²⁶³ The Court noted that, in 2005, the applicant was in his 80s and in poor health. He had been denied the possibility of pursuing his profession, and had for a long period been subject to “relatively restrictive” bail conditions.²⁶⁴

(3) Right to respect for private and family life

1.116 The European Court of Human Rights has held that a three-year limitation period for the bringing of paternity proceedings violated the right to respect for private and family life, which is protected under Article 8 of the Convention. In *Phinikaridou v Cyprus*, the Court considered an absolute three-year time limit for a child to bring proceedings for judicial recognition of paternity, running from date on which he or she reached the age of majority irrespective of his or her awareness of the parent’s identity. In the case under consideration, the child had only learned of her father’s identity after the limitation period had expired, and it was then impossible for her to bring proceedings. The Court found that the main problem with the application of the inflexible limitation period, to which there were no exceptions, was its absolute nature rather than its *dies a quo* as such.²⁶⁵ The Court held as follows:-

“In the Court’s view, a distinction should be made between cases in which an applicant has no opportunity to obtain knowledge of the facts and, cases where an applicant knows with certainty or has grounds for assuming who his or her father is but for reasons unconnected with the

²⁶¹ *Barry v Ireland*, no. 18273/04, judgment of December 15 2005, [2005] ECHR 865. The State was ordered to pay to the applicant €15,000 in damages.

²⁶² *Ibid* at § 37.

²⁶³ *Ibid* at § 35.

²⁶⁴ *Ibid* at § 45-46.

²⁶⁵ *Phinikaridou v Cyprus* no. 23890/02, judgment of 20 December 2007 at § 62.

law takes no steps to institute proceedings within the statutory time-limit [citations omitted].”²⁶⁶

1.117 The Court engaged, as is usual, in the balancing of the interests at stake, and concluded that the general interests, as well as the competing interests of the presumed father and his father were accorded greater weight than the applicant’s right to find out her origins. It found the three year time limit to breach Article 8 on the following basis:-

“The Court ... does not consider that such a radical restriction of the applicant’s right to institute proceedings for the judicial determination of paternity was proportionate to the legitimate aim pursued. In particular, it has not been shown how the general interest in protecting legal certainty of family relationships or the interest of the presumed father and his family outweighed the applicant’s right to have at least one opportunity to seek judicial determination of paternity.”²⁶⁷

(4) Right to an Effective Remedy

1.118 A further provision that provides guidance as to the State’s obligations when considering the imposition of limitation periods is Article 13 of the Convention, which provides:-

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

1.119 Article 13 requires national authorities to provide a domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention, and to grant appropriate relief.²⁶⁸ The national authority with responsibility under Article 13 does not have to be judicial authority but, in the case of authorities other than judicial authorities, the European Court of Human Rights has held that “its powers and the guarantees are relevant in determining whether the remedy before it is effective.”²⁶⁹

1.120 The Court has held that “[e]ven if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies

²⁶⁶ *Phinikaridou v Cyprus* no. 23890/02, judgment of 20 December 2007 at § 63.

²⁶⁷ *Ibid* at § 64.

²⁶⁸ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 55.

²⁶⁹ *Ibid* at § 58.

provided for under domestic law may, in principle, do so.”²⁷⁰ The remedy required must be “effective” in practice as well as in law.²⁷¹ The ‘effectiveness’ of a remedy does not depend on the certainty of a favourable outcome for the applicant.²⁷² A remedy is effective “if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred”.²⁷³ The burden of proving the existence of effective and sufficient remedies lies upon the State invoking the rule.²⁷⁴

1.121 Apart from being effective, the remedy provided by Contracting States must also be adequate and accessible.²⁷⁵ The European Court of Human Rights has held that “particular attention should be paid to, *inter alia*, the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration”.²⁷⁶

1.122 The Irish State was also found to be in violation of Article 13 in the *Doran*²⁷⁷ and *O’Reilly*²⁷⁸ cases, discussed above in relation to Article 6 of the Convention.

(5) Deprivation of Property

1.123 Of further relevance to the imposition of limitation periods is Protocol 1 to the Convention, Article 1 of which governs the rights of every natural and legal person to the peaceful enjoyment of their possessions. Article 1 provides, in the relevant section, that:

²⁷⁰ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 58.

²⁷¹ *Ibid* at § 56.

²⁷² *Ibid* at § 58.

²⁷³ *Ibid* at § 58.

²⁷⁴ *Ibid*. See also *Croke v Ireland* (dec), no. 33267/96, 15 June 1999 (friendly settlement), and *Quinn v Ireland* (dec), no. 36887/97, 21 September 1999.

²⁷⁵ *Doran v Ireland*, no. 50389/99, judgment of July 31 2003, [2003] ECHR 417 at § 56.

²⁷⁶ *Ibid* at § 57.

²⁷⁷ *Ibid* at § 57.

²⁷⁸ *O’Reilly and anor v Ireland*, no. 54725/00, judgment of October 29 2004, [2006] 40 EHRR 40.

“No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

1.124 Article 1 of Protocol No. 1 comprises three distinct rules, namely:-

- (1) The right to the peaceful enjoyment of property
- (2) The imposition of conditions on the deprivation of possessions.
- (3) Contracting States’ entitlement, amongst other things, to control the use of property in accordance with the general interest.

1.125 The European Court of Human Rights has held that these rules are not “distinct” in the sense of being unconnected: the second and third are concerned with particular instances of interference with the right to the peaceful enjoyment of property and must be construed in the light of the general principle enunciated in the first rule.²⁷⁹ Thus, any interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the public or general interest of the community, and the protection of the individual’s fundamental right. In addition, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.²⁸⁰

E Conclusion and Provisional Recommendations

1.126 In conceptual terms, the Commission considers that a system of rules governing the limitation of actions must aim to ensure that legal arguments are resolved in an orderly and timely fashion. Any such system must be designed with a view to ensuring, to the greatest extent possible, fairness to the plaintiff and to the defendant, with due regard to the public interest. The Commission is mindful, in brief, that a limitations system must strive to strike a balance between the competing constitutional and Convention rights of plaintiffs, defendants and the public, as set in this Chapter.

²⁷⁹ *Bruncrona v Finland*, App no. 41673/98, judgment of 16 November 2004 at § 65.

²⁸⁰ The Commission is currently engaged in a separate project on adverse possession (*Third Programme of Law Reform 2008-2014*, Project 20), which will discuss the application of the *Statute* in this context. This will include discussion of the application of these provisions of the Convention, in the light of the decision of the Grand Chamber of the European Court of Human Rights in *J.A. Pye (Oxford) Ltd v United Kingdom*, App No. 44302/02, judgment of 30 August 2007.

1.127 The Commission considers the following synopsis set out by the Law Reform Commission of Western Australia to be particularly apposite:

“[A] limitations system needs to hold the balance fairly between the competing interests of the plaintiff and the defendant, and should also take proper account of the interests of society generally. It must be capable of dealing appropriately with a wide variety of differing circumstances, and be able to recognise the special cases which merit different treatment from the norm, without making it necessary to have different rules for each different situation.”²⁸¹

1.128 In light of the analysis in this Chapter, the Commission has accordingly concluded that the law governing limitation of actions must ensure that, in resolving civil disputes in an orderly and timely fashion, it takes into account the competing rights of plaintiffs and defendants as well as the general interest of the public, within the framework of the Constitution and the European Convention on Human Rights.

1.129 *The Commission provisionally recommends that the law governing limitation of actions must ensure that, in resolving civil disputes in an orderly and timely fashion, it takes into account the competing rights of plaintiffs and defendants as well as the general interest of the public, within the framework of the Constitution and the European Convention on Human Rights.*

²⁸¹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 3611, 1997), at paragraph 7.8.

CHAPTER 2 CURRENT LAW OF LIMITATIONS

A Introduction

2.01 In this Chapter, the Commission outlines the current general statutory provisions on limitation of actions in Ireland, as set out in the *Statute of Limitations 1957*. The Commission also describes some of the difficulties and complexities arising from the current state of the law. This Chapter therefore forms an essential background against which the reforms being proposed by the Commission can be assessed.

2.02 In Part B, the Commission discusses the background to the enactment of the *Statute of Limitations 1957*. In Part C, the Commission discusses in detail the key basic limitation periods in the 1957 Statute, with particular emphasis on the common law actions (contract, debt-related claims and tort, including personal injuries claims) that form the focus of this Consultation Paper. For the sake of completeness, and to illustrate the wide variety of limitation periods in the 1957 Statute, the Commission also discusses the basic limitation periods for other forms of actions, even though it does not propose to make wide-ranging recommendations in respect of those other actions.¹

2.03 In Part D, the Commission notes that, in general, the limitation periods under the *Statute of Limitations 1957* run from the date of accrual of the cause of action. In this respect, unless otherwise specified, the accrual of a right of action is governed by the common law. The Commission also notes that, subject to the specific exceptions discussed in Part D, no general discoverability rule applies in Ireland at present. In Part E, the Commission notes that, subject to the exceptions discussed, “ultimate” or “long stop” limitation periods are not a common feature of the current law of limitation in Ireland. Part F discusses the limited provision for judicial discretion to extend or dis-apply statutory limitation periods. Part G refers briefly to the (related) inherent discretion of the courts to dismiss claims where there has been undue delay; this is discussed in detail in Chapter 7.

¹ On the general scope of the Consultation Paper, see paragraph 14ff of the Introduction.

2.04 In Part H, the Commission discusses the provisions of the 1957 Statute that provide for the postponement of running of the various fixed limitation periods in the event of, for example, the plaintiff being under age or some external factor such as fraud. In Part I, the Commission discusses some necessary aspects of practice and procedure of the courts in respect of limitation periods. In Part J, the Commission provides a summary of the complexities and problems that arise from the current state of limitations law in the 1957 Statute. In Part K, the Commission briefly draws conclusions from the analysis in the Chapter and makes a provisional recommendation on the need for reform.

B The Statute of Limitations 1957

2.05 Until 1959, the term “*Statute of Limitations*” was used to cover a great number of enactments scattered over the statute book, each of which dealt with a special statutory class of action. In addition to the *Common Law Procedure (Ireland) Act 1853* and the *Real Property Limitation Acts 1833 to 1874*, the following were the main Acts involved:

- The *Fatal Accidents Act 1846*,² and later the *Fatal Injuries Act 1956*;³
- The *Landlord and Tenant Act (Ireland) 1860* (known as *Deasy’s Act*);⁴
- The *Maritime Conventions Act 1911*;⁵
- The *Industrial and Commercial Property Act 1927*;⁶
- The *Moneylenders Act 1933*;⁷
- The *Workmen’s Compensation Act 1934*;⁸
- The *Merchant Shipping Act 1947*;⁹ and

² 9 & 10 Vic, c. 93.

³ No. 3 of 1956. These dealt with actions for the benefit of relatives of a deceased person killed by the wrongful act, neglect or default of another.

⁴ 23 & 24 Vic, c. 154. This dealt with actions by an ejected tenant for restitution of possession.

⁵ 1 & 2 Geo, 5., c.57. This dealt with actions to enforce a claim or lien against a ship or its owners.

⁶ No. 16 of 1927. This dealt with actions for infringement of copyright.

⁷ No. 36 of 1933. This dealt with actions by moneylenders in respect of money lent.

⁸ No. 9 of 1934. This dealt with actions by workmen for compensation for injuries arising out of and in the course of their employment.

- The *Public Authorities Protection Act 1893*.¹⁰

2.06 Leave was granted by the Dáil in December 1954 to introduce the *Statute of Limitations Bill 1954*, intended 'to consolidate with amendments certain enactments relating to the limitation of actions and arbitrations'.¹¹ The *Statute of Limitations Bill 1954* was debated in the Dáil in 1956¹² and then in the Seanad,¹³ a Special Committee of which reported in February 1957.¹⁴ The 1954 Bill was enacted as the *Statute of Limitations Act 1957* and came into force in accordance with its own terms on 1 January 1959.¹⁵

2.07 During the Dáil debates, the Minister for Justice stressed that the object of the 1954 Bill was to consolidate and amend existing legislation, and to tidy up of the law of limitation in Ireland.¹⁶ It was reiterated during the Seanad debates that the Bill was designed to reform, clarify, repeal, amend, overrule and consolidate the law on limitations.¹⁷ The law of limitation was, at that stage,

⁹ No. 46 of 1947. This dealt with actions against carriers or ships for loss or damage.

¹⁰ 56 & 57 Vic, c.61. This was repealed by the *Public Authorities (Judicial Proceedings) Act 1954*.

¹¹ Dáil Debates, volume 147, December 15 1954, *Statute of Limitations Bill, 1954—First stage*.

¹² Dáil Debates, volume 154, March 1 1956, *Statute of Limitations Bill, 1954 - Second Stage*; volume 160, November 14 1956, *Committee Stage*; volume 160, November 15 1956, *Committee Stage (resumed)*; volume 160, December 12 1956, *Report and Final Stages*.

¹³ Seanad Debates, volume 47, January 16 1957, *Statute of Limitations Bill 1954 – Second Stage*.

¹⁴ Seanad Debates, volume 47, January 16 1957, *Statute of Limitations Bill, 1954 - Referred to Special Committee*; volume 47, February 27 1957, *Report of Special Committee*; volume 47, February 27 1957, *Report and Final Stages*.

¹⁵ Section 1(2), *Statute of Limitations 1957*.

¹⁶ Dáil Debates, volume 154, March 1 1956, *Statute of Limitations Bill, 1954 - Second Stage* at 1128.

¹⁷ Seanad Debates volume 47, January 16 1957, *Statute of Limitations Bill 1954 – Second Stage* at 56. See also Seanad Debates, volume 47, January 16 1957, *Statute of Limitations Bill, 1954 - Referred to Special Committee*. Senators Cox, Crosbie, Harold Douglas, McCrea, Ó Buachalla, Ó Ciosáin, O'Connell, Stanford and Walsh were appointed to the Special Committee (volume 47, January 16 1957, Report of Committee of Selection).

“in many respects uncertain and difficult.”¹⁸ It was considered that “there are few branches of the law of this country or of any country that are more difficult to follow, more difficult to understand than is the law dealing with this question of the limitation of actions.”¹⁹ The *Statute* was intended to reflect the increase in the “tempo of life” and the profound changes in the conduct of business affairs, and to bring limitations law “in conformity with the requirements of modern society.”²⁰

2.08 The *Statute of Limitations 1957* is almost entirely based on the principle of fixed periods of limitation running from accrual. Discoverability principles apply, however, to personal injuries actions (including wrongful death actions) and actions under the *Liability for Defective Products Act 1991*. A “long-stop” limitation period of 10 years also applies under the *Liability for Defective Products Act 1991*, reflecting its origins in an EU Directive. The concept of a discretion to extend a limitation period is, in general, not a feature of traditional limitation Acts such as the *Statute of Limitations 1957*, although such a provision is included in the *Defamation Act 2009*, which provides for a general one year limitation period which may be extended to two years on certain conditions.

C Basic Limitation Periods

2.09 The *Statute* contains seven different limitation periods, which apply to a wide range of civil actions:

- **1 year** - actions in respect of defamation;²¹
- **2 years** – certain personal injuries actions;²² actions in respect of defective vehicles; fatal injuries actions; actions for an account; actions

¹⁸ Seanad Debates, volume 47, January 16 1957, *Statute of Limitations Bill 1954 – Second Stage* at 58.

¹⁹ *Ibid* at 60.

²⁰ *Ibid* at 61.

²¹ Inserted by section 38(1) of the *Defamation Act 2009*. Previously, a three year limitation period applied to actions in respect of slander and a six-year limitation period applied to actions in respect of libel. The one year limitation period introduced by the 2009 Act may be extended to two years on certain conditions.

²² This applies only to actions “claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision).” See section 3(1), *Statute of Limitations (Amendment) Act 1991*, as amended by section 7, *Civil Liability and Courts Act 2004*.

to recover a penalty or forfeiture or any sum by way of penalty or forfeiture; actions to recover an amount recoverable by one tortfeasor (person who commits a tort) against another.

- **3 years**: - defective products actions.²³
- **6 years** –actions based on simple contract and quasi contract; actions to enforce a recognisance, to enforce a sum, to recover a sum recoverable by virtue of any other enactment, to recover seamen’s wages; actions to recover arrears of interest in respect of a judgment debt; actions in respect of successive conversions; actions founded on tort subject to several exceptions; actions to recover arrears of rentcharges, conventional rent, dower, annuity paid on personal property; actions to recover arrears of interest on the principal sum secured by a mortgage or charge; actions to recover arrears of interest due on foot of a chattel mortgage; actions for breach of trust.
- **12 years** – actions based on an instrument under seal, actions to enforce an award where the arbitration agreement is under seal, actions upon a judgment; actions to recover land; actions to recover equitable interests in land; actions to recover future interests in land where the previous owner is not in possession at the date of accrual; actions claiming sale of land that is subject to a mortgage;²⁴ actions claiming sale of land subject to a judgment mortgage; actions claiming redemption of land; actions to recover principal money secured by a mortgage or charge; actions in respect of certain personal rights in or over land.
- **30 years** – actions by a ‘State authority’ to recover land or to recover future interests in land where the previous owner is not in possession at the date of accrual; actions by a ‘State authority’ claiming sale of land that is subject to a mortgage; actions to recover principal money secured by a mortgage or charge on specified mortgages or charges.
- **60 years** – actions by a ‘State authority’ to recover land that is (or was) ‘foreshore’.

2.10 Thus, it is clear that the more common limitation periods are two and six years. The length of the existing basic limitation periods has been described as “a matter of historical accident”.²⁵ The Commission discusses below the

²³ *Liability for Defective Products Act 1991*.

²⁴ Arising from the changes made by Part 10 of the *Land and Conveyancing Law Reform Act 2009*, a mortgage will in future no longer be part of the title to land.

²⁵ Dockray “Why do we need Adverse Possession” [1985] Conv 272.

basic limitation periods that currently apply, and some of the problems associated with those limitation period. It will be apparent from this discussion that the law of limitation is complex, and perhaps unnecessarily so.

(1) Tort Actions

2.11 For actions founded on tort, the limitation period is six years from the date of accrual of the cause of action, subject to several exceptions.²⁶ This uniform limitation period was introduced in 1957. Previously, actions for assault, battery, menace, wounding and imprisonment had a limitation period of four years, and actions for slander actionable *per se* had a limitation period of two years.²⁷

2.12 The date of accrual of a cause of action in tort is governed by the common law. Where a tort is actionable *per se* - that is, without proof of actual damage - the right of action accrues on the date of the wrongful act. Where the tort is actionable only on proof of actual damage, time does not begin to run until some damage actually occurs. These rules of accrual have the result that time may begin to run before the injured party discovers the damage, and indeed before the potential plaintiff has been afforded a reasonable opportunity to discover the damage.

2.13 There remain several exceptions to the uniform, six-year period, including actions in respect of defamation, personal injuries, defective motor vehicles, defective products and fatal injuries. There follows a discussion of the particular rules of limitation applicable to such actions.

(a) Defamation

2.14 Prior to 1959, the limitation of defamation actions in Ireland was governed by the *Common Law Procedure Act (Ireland) 1853*, which set a six-year limitation period for actions for libel and actions for slander actionable on proof of special damage.²⁸ A two-year limitation period for actions for slander actionable *per se*.

2.15 Until 2009, the limitation of defamation actions in Ireland was governed by section 11(2) of the *Statute of Limitations 1957*, as enacted. Libel and slander were treated differently. Actions in tort, including libel, were subject to a six-year limitation period²⁹ while a three-year limitation period applied to

²⁶ Section 11(2)(a), *Statute of Limitations 1957*.

²⁷ Oireachtas Debates, Dáil Eireann, volume 154, March 01 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1136.

²⁸ Section 20, *An Act to amend the Procedure of the Superior Courts of Common Law in Ireland*, 16° and 17° Victoria, c.113 (August 20 1853).

²⁹ Section 11(2) (a), *Statute of Limitations 1957*.

actions for slander of any kind - whether actionable *per se* or on proof of special damage.³⁰ Actions brought outside of these periods were statute-barred.³¹

2.16 During the Dáil debate on the *Statute of Limitations Bill 1954*, the Minister for Justice suggested that “there should be a uniform period for all types of slander but that it should be a shorter period than that provided for in libel and other torts.”³² The Minister proposed that the six-year limitation period applicable in Britain for all types of slander ought not to be followed. He instead recommended a two-year uniform limitation period for all slander actions, on the following basis:³³

“It must be very seldom, indeed, that slander actions are brought after two years. Further, a person’s recollection of the exact words spoken in a particular instance is likely to be uncertain as time goes on: in the case of libel there is a permanent record.”³⁴

2.17 By the time of the Seanad debates, however, the uniform limitation period for slander had been changed to three years, in response to concern that two years might be too short in the case of slanders actionable on proof of special damage.³⁵ The Minister remarked that “[i]n the case of slander, there seems no real reason why the action should not be brought within three years.”³⁶ Senator Ó Ciosáin agreed that “after three years it would be fairly difficult to produce the necessary evidence to sustain the action in a court of law.”³⁷

2.18 Under the *Statute*, as amended, the limitation periods for libel and slander both ran from the date of accrual of the cause of action. Libel actions accrued on the date on which the publication was made to a third party. Actions in respect of slander that were actionable *per se* accrued on the date on which

³⁰ Section 11(2) (c), *Statute of Limitations 1957*.

³¹ This is subject to exceptions in the case of disability, fraud and mistake. See sections 47-72, *Statute of Limitations 1957*.

³² Dáil Debates vol. 154 (March 01 1956), *Statute of Limitations Bill 1954 – Second Stage* at 1136.

³³ *Ibid* at 1136.

³⁴ *Ibid* at 1136.

³⁵ McDonald *Irish Law of Defamation* (1987) at 238.

³⁶ Seanad Debates vol. 47 (January 16 1957), *Statute of Limitations Bill 1954 – Second Stage* at 57.

³⁷ *Ibid* at 63.

the words were spoken.³⁸ For actions in respect of slander that required proof of special damage, the action accrued on the date on which the special damage was sustained.

(I) *1991 Commission Recommendations*

2.19 In 1991, following consultation on the matter,³⁹ the Commission published a *Report on the Civil Law of Defamation*⁴⁰ in which it recommended that a single limitation period should be adopted in respect of all defamation actions.⁴¹ The Commission noted that during the consultation phase, there had been no dissent from, and widespread support for, the provisional recommendation of a single limitation period of three years for all defamation actions.⁴² It was therefore recommended that a uniform three-year limitation period be introduced, running from the date of accrual.⁴³ The Commission recommended that the provisions as to the extension or postponement of limitation periods in cases of disability, fraud and mistake contained in the *Statute of Limitations 1957* should apply to all defamation actions other than actions in respect of defamation of a deceased person.⁴⁴

(II) *Mohan Report 2003*

2.20 In 2002, the Minister for Justice established a *Legal Advisory Group on Defamation*, chaired by Hugh Mohan SC. The Group was asked to take account of recent developments in other jurisdictions since the publication of the Law Reform Commission's Reports. The Group had at its disposal proposals for a Defamation Bill that had been approved by the Government in December

³⁸ See *Quinn v Wilson* (1850) 13 ILR 381, cited in McDonald *Irish Law of Defamation* (1987) at 238.

³⁹ See Law Reform Commission *Consultation Paper on the Civil Law of Defamation* (March 1991).

⁴⁰ Law Reform Commission *Report on the Civil Law of Defamation* (LRC 38-1991). See also Law Reform Commission *Report on the Crime of Libel* (LRC 41-1991).

⁴¹ Law Reform Commission *Report on the Civil Law of Defamation* (LRC 38-1991) at paragraph 13.1.

⁴² *Ibid* at paragraph 13.1.

⁴³ Law Reform Commission *Report on the Civil Law of Defamation* (LRC 38-1991) at paragraph 13.1. The Commission further recommended that in the case of an action for a declaratory judgment, the limitation period should be one year from the date of accrual. *Ibid*.

⁴⁴ *Ibid* at paragraph 13.1.

2001. In 2003 it published a Report containing 23 recommendations (“the Mohan Report”), and also attached a *General Scheme of a Defamation Bill*.⁴⁵

2.21 The Mohan Report addressed, among other issues, the limitation of defamation actions.⁴⁶ It noted that the Law Reform Commission had recommended of the introduction of a general, three-year limitation period.⁴⁷ After examining recently-enacted defamation legislation in other jurisdictions, however,⁴⁸ the Report noted “an increasing tendency to opt for even shorter periods of limitation” accompanied by “safeguard measures whereby a court would have a discretion to allow defamation proceedings to be taken, notwithstanding that the limitation period had expired.”⁴⁹ The Report recommended that the limitation period for defamation should be reduced to one year, considering this to be ample in the vast majority of cases.⁵⁰

2.22 The Mohan Report further recommended that the courts should be given the discretion to disapply the one-year limitation period, in order to cater for exceptional cases.⁵¹ It considered that this would assist plaintiffs should they become aware of the potentially defamatory material more than one year after the original publication.⁵² In order to exercise their discretion, the courts would have to be satisfied that “any prejudice which the plaintiff might suffer if the action were not to proceed significantly outweighs any prejudice which the defendant might suffer if the action were to proceed.”⁵³ These recommendations were set out in section 37 of the *General Scheme of a Defamation Bill*,⁵⁴ under which the courts could only exercise their discretion

⁴⁵ *Report of the Legal Advisory Group on Defamation* (March 2003), available at www.justice.ie.

⁴⁶ *Report of the Legal Advisory Group on Defamation* (March 2003) at § 53-56.

⁴⁷ *Ibid* at § 53.

⁴⁸ *Ibid* at § 53. The Report notes that in New Zealand, the limitation period is two years whereas in New South Wales and the United Kingdom it is one year.

⁴⁹ *Ibid* at § 53.

⁵⁰ *Report of the Legal Advisory Group on Defamation* (March 2003) at § 53.

⁵¹ *Ibid* at § 53.

⁵² *Ibid* at § 56.

⁵³ *Ibid* at § 53.

⁵⁴ This limitation period applied to proceedings for defamation (section 37(1)) and actions claiming damages for slander of title, slander of goods or other malicious falsehood (section 37(2)).

where this was “in the interests of justice”.⁵⁵ The courts would be mandated to have regard to the circumstances of the case, including the length of and reason for the delay and the extent to which the relevant evidence is likely to be unavailable or less cogent because of the delay.⁵⁶

2.23 The Group also considered that a long-stop of six years should apply, running from the date of accrual,⁵⁷ to avoid any injustice which the one-year limitation period might cause. No action for defamation could be commenced after the expiration of this ultimate limitation period.

2.24 It further recommended that the limitation period should run from the date on which the matter complained of was first published and, in the case of publication by electronic means, that date should be the date on which the material was first made available.⁵⁸ In effect, it recommended the introduction of a single publication rule.⁵⁹

2.25 The Group noted that the general rules concerning disability, fraud or mistake would still apply, irrespective of the discretion to dis-apply and the long-stop.⁶⁰

(III) *Defamation Act 2009*

2.26 The *Defamation Act 2009* substantially implements the recommendations of the Mohan Report with respect to the limitation of actions. It amends section 11(2) (c) of the *Statute of Limitations 1957* so as to provide a one-year basic limitation period for defamation actions,⁶¹ running from the date of accrual of the cause of action. It also provides an alternative limitation period of “*such longer period as the court may direct not exceeding 2 years from the date on which the cause of action accrued.*” Thus, the maximum limitation period is two years from accrual. The nature of the discretion allowed under the alternative limitation period is discussed in Chapter 6, below.

⁵⁵ Section 37(1) of the *General Scheme of a Defamation Bill*.

⁵⁶ See *ibid* at section 37(2).

⁵⁷ *Report of the Legal Advisory Group on Defamation* (March 2003) at § 53.

⁵⁸ *Report of the Legal Advisory Group on Defamation* (March 2003) at § 56.

⁵⁹ *Ibid* at 42, Recommendation 18.

⁶⁰ *Ibid* at § 53.

⁶¹ See section 38(1) (a), *Defamation Act 2009*. Section 6 of the 2009 Act provides that the tort of libel and the tort of slander shall cease to exist and shall instead be referred to as the tort of defamation.

2.27 Under the new section 11(3B), the date of accrual is defined as the date upon which the defamatory statement is first published. Where the statement is published through the medium of the internet, the date of accrual is the date on which it is first capable of being viewed or listened to through that medium.⁶² Under the amended section 11(2) (c), both new limitation periods run from the date on which the cause of action accrued.⁶³

2.28 The 2009 Act also amends the disability provisions of the 1957 Act so as to allow for the limitation period to be postponed by reason of disability, by substituting the words “one year or such longer period as the court may direct not exceeding two years” for the words “six years”.⁶⁴

(b) Personal Injuries

2.29 Historically, the limitation of personal injuries actions was treated in the same manner as all other actions in tort (six years), while actions for assault, menace, battery, wounding, and imprisonment had a limitation period of four years.

2.30 At the time of the enactment of the *Statute of Limitations 1957*, “roughly half” of all tort actions were estimated to be personal injuries actions.⁶⁵ The *Statute* introduced a new, three-year limitation period for personal injuries actions for negligence, nuisance or breach of duty.⁶⁶ This limitation period applied whether or not the action is against the State or another public authority.⁶⁷ It represented, at the time, a “fairly important change in the law.”⁶⁸

⁶² Section 11(3B), *Statute of Limitations 1957*, as inserted by section 38(1) (b), *Defamation Act 2009*.

⁶³ Section 11(2) (b), *Statute of Limitations 1957*, as amended by section 38(1)(a), *Defamation Act 2009*.

⁶⁴ Section 49(3), *Statute of Limitations 1957*, as amended by section 38(2), *Defamation Act 2009*.

⁶⁵ Oireachtas Debates, Dáil Eireann, volume 154, March 01 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1136.

⁶⁶ Section 11(2)(b), *Statute of Limitations 1957*, as enacted. “Personal injuries” were defined in section 2(1) so as to include any disease and any impairment of a person's physical or mental condition.

⁶⁷ Before the repeal of the *Public Authorities Act 1893*, the limitation period was six months from the act, neglect or default of the public authority. At the time of the enactment of the *Statute of Limitations 1957*, the limitation period was four years from the date the cause of action arises irrespective of the date of such act, neglect or default.

The three year period accorded, at the time, with the limitation period applicable to fatal injuries actions.⁶⁹

2.31 The constitutionality of the three-year limitation period for personal injuries actions was considered in *Cahill v Sutton*.⁷⁰ The plaintiff argued that the absence of a “saver” in favour of injured persons who, through no fault of their own, were unaware of relevant facts until after the expiration of the limitation period had expired, rendered section 11(2) unconstitutional. At that point, a “saver” of that nature had been introduced in the UK in its *Limitation Act 1963*. In the High Court, Finlay P found the 1957 *Statute* to be valid. The plaintiff appealed, but the Supreme Court found it unnecessary to decide the point as the plaintiff had no *locus standi* to raise the point, on the basis that she had been aware of the relevant circumstances before the limitation period expired. Henchy J (with the agreement of three other members of the Court) commented that, while the Court did not therefore deal with the constitutionality point:

“it is proper to point out that the justice and fairness of attaching to that sub-section a saver such as was inserted by the British Parliament in s.1 of the Limitation Act 1963 are so obvious that the enactment by our Parliament of a similar provision would merit urgent consideration.”⁷¹

2.32 McCarthy J. in *Norris v Attorney General*⁷² construed the remarks of Henchy J as having indicated that section 11(2) of the *Statute* was unconstitutional in the absence of a saver, and comments made by Costello J. in *Brady v Donegal County Council*⁷³ suggested a certain willingness to construe the provision likewise.

2.33 Following amendments introduced by the *Statute of Limitations (Amendment) Act 1991*,⁷⁴ personal injuries actions are now subject to a specialised regime which applies to actions claiming damages in respect of personal injuries caused by negligence, nuisance or breach of duty, whether the duty exists by virtue of a contract or of a provision made by or under a statute or

⁶⁸ Oireachtas Debates, Dáil Eireann, volume 154, March 01 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1136.

⁶⁹ See section 3(6), *Fatal Injuries Act 1956*; repealed by the *Civil Liability Act 1961*, section 48(6) of which set the same limitation period for fatal injuries actions.

⁷⁰ [1980] IR 269.

⁷¹ [1980] IR 269, 288.

⁷² [1984] IR 36, 89.

⁷³ *Brady v Donegal County Council* [1989] ILRM 282.

⁷⁴ *Statute of Limitations (Amendment) Act 1991*.

independently of any contract or any such provision. A date of knowledge test governs the running of the limitation period for such actions.⁷⁵

2.34 As a result of amendments introduced by the *Civil Liability and Courts Act 2004* which came into force in 2005,⁷⁶ personal injuries actions must be brought before the expiry of two years from the accrual of the cause of action or the date of knowledge (if later).⁷⁷ It was originally proposed that a one-year limitation period would be introduced for personal injuries actions, but this was increased during the Oireachtas debate on the 2004 Act, primarily on the basis of protests that one year was too short a period for complex medical negligence claims.⁷⁸

(i) The Injuries Board

2.35 The Personal Injuries Assessment Board, which uses the informal title Injuries Board, was established under the *Personal Injuries Assessment Board Act 2003* to reduce the costs involved in personal injuries claims and to reduce the amount of time it takes to finalise a claim.⁷⁹ Persons seeking damages for personal injuries may not bring court proceedings until they have applied to the Board and received authorisation to bring such proceedings.⁸⁰

2.36 Although a claimant cannot commence court proceedings in respect of a personal injuries claim until authorised by the Board, the claimant may apply to the courts for any interlocutory order provided for by the Rules of Court

⁷⁵ Section 3(1), *Statute of Limitations (Amendment) Act 1991*.

⁷⁶ Section 7(a), *Civil Liability and Courts Act 2004* was commenced on March 31 2005. Transitional cases are governed by section 5A into the 1991 Act, as inserted by section 7(d) of the 2004 Act. A short stop applies under section 7 to actions where the relevant date (i.e. date of accrual or date of knowledge, whichever is later) falls before 31 March 2005. Thus, the limitation period is two years from the date of commencement or three years from the relevant date (i.e. date of knowledge or accrual), whichever occurs first.

⁷⁷ Section 3, *Statute of Limitations (Amendment) Act 1991*, as amended by section 7(a), *Civil Liability and Courts Act 2004*.

⁷⁸ Binchy "The Impact of the New Act on Tort Law" in *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* 47 (Craven & Binchy eds., Dublin: Firstlaw, 2005). See further Seanad Debates, March 11, 2004, Col. 1833.

⁷⁹ The *Personal Injuries Assessment Board Act 2003* was commenced on 13 April 2004: see the *Personal Injuries Assessment Board Act 2003 (Commencement) Order 2004* (S.I. No. 155 of 2004). The 2003 Act was amended by the *Personal Injuries Assessment Board (Amendment) Act 2007*.

⁸⁰ Section 12(1), *Personal Injuries Assessment Board Act 2003*.

or inherent in the courts' jurisdiction in civil proceedings.⁸¹ This may include an injunction restraining the transfer of assets to a place outside of the State, or restraining the dissipation of assets, or requiring evidence to be preserved. The making of such an application is not regarded as the commencement of proceedings in respect of the relevant claim for the purposes of the Statutes of Limitations.⁸²

2.37 The period beginning from "the making of an application" to the Board and ending six months from the date of issue of an authorisation by the Board is disregarded for the purposes of the *Statutes of Limitation*.⁸³ As will be outlined below, the following may occur from the date of making the application:

- i) The respondent has 90 days to consent to the assessment;
- ii) The Board then has nine months (with a possible six-month extension) to complete the assessment;
- iii) The claimant then has 28 days to reject the assessment;
- iv) If an authorisation is issued, the claimant has 6 months before the *Statute* begins to run again.

2.38 This makes up 19 months (with the possibility of a six-month extension) during which the running of the limitation period is frozen.

(I) *The "Making of an Application"*

2.39 The date of making an application must be clearly defined so that the date on which the running of the limitation period against the claimant is frozen can be clearly identified. This is not currently the case. The current situation, following the introduction of the Board's Rules in May 2004, is that the Board issues an acknowledgement in writing of the date of receipt of the completed application.⁸⁴ The date acknowledged by the Board is the date on which the running of the relevant limitation period is frozen.

2.40 Under the Rules, the application must be made in writing or by email, and must contain such information as may from time to time be specified by the Board. The application must be accompanied by specified documents⁸⁵ and the

⁸¹ Section 12(2).

⁸² Section 12(5).

⁸³ Section 50.

⁸⁴ Rule 3(3), *Personal Injuries Assessment Board Rules*, available at <http://www.piab.ie/rules.html>.

⁸⁵ *Ibid* at Rule 3(1)(a),(b) and (c).

applicable application charge.⁸⁶ Difficulties have been experienced in registering applications with the Board owing to the list of documents required. In particular, claimants often have difficulties in procuring a medical report. It is also problematic that the Board is not required to furnish the written acknowledgement of receipt of the application within any specific period of time. Claimants are, therefore, left in limbo until receiving the acknowledgement, particularly if the application is made close to the expiry of the limitation period.

(II) *The Duration of an Assessment*

2.41 Once the claimant has applied to the Board, it must serve notice on the respondent informing him or her of the application and requesting him or her to state in writing within a specified period (usually 90 days) whether he or she consents to an assessment being made in respect of the application.⁸⁷ The Board reported in June 2007 that a surprising number of claims were settling within this 90-day period, before the formal assessment begins.⁸⁸

2.42 If the respondent expressly refuses consent, the Board must issue an authorisation to the claimant to issue court proceedings.⁸⁹ If the respondent consents to the making of an assessment, the Board may arrange for an assessment to be made,⁹⁰ although in exceptional circumstances it may decline to make an assessment and instead issue an authorisation.⁹¹ The Board has a statutory duty to ensure that assessments in respect of relevant claims are made as expeditiously as may be,⁹² and it is statutorily required to determine a claim within nine months of the date of consent.⁹³ By May 2007, it had an average finalisation period of 7.4 months from the date of consent to the date of the award, or 10.2 months from the date of application to the date of the award.⁹⁴

⁸⁶ *Ibid* at Rule 3(2); section 22, *Personal Injuries Assessment Board Act 2003* (No. 43 of 2003).

⁸⁷ Section 13, *Personal Injuries Assessment Board Act 2003*.

⁸⁸ *Personal Injuries Assessment Board Annual Report 2006* (PRN: A7/1009, June 2007) at 4.

⁸⁹ Section 14(2), *Personal Injuries Assessment Board Act 2003*.

⁹⁰ *Ibid* at section 14(1).

⁹¹ *Ibid* at section 17.

⁹² *Ibid* at section 49(1).

⁹³ *Ibid* at section 49(2) and (3).

⁹⁴ *Personal Injuries Assessment Board Annual Report 2006* (PRN: A7/1009, June 2007) at 4.

2.43 If there is more than one respondent, the date may be pushed back further.⁹⁵ This time may be extended by a further six months, or further still with the claimant's consent.⁹⁶

(III) *The Issue of an Authorisation*

2.44 Once the assessment has been made and notified to the parties, the claimant has 28 days and the respondent has 21 days from the date of service of the notice to accept or reject the assessment. If either party refuses to accept the assessment, the Board must issue an authorisation for court proceeding to be commenced.⁹⁷ Certain assessments require court approval. If those assessments are not approved, the Board must issue an authorisation.⁹⁸ Once the authorisation is issued, a further six month period elapses before the *Statute of Limitations* once again begin to run against the claimant.⁹⁹

2.45 Thus it is clear that the mechanics of the assessment of claims by the Injuries Board has a considerable impact on the running of the basic limitation period in personal injuries cases. This contributes to uncertainty in the operation of the Statutes of Limitation.

(c) *Defective Vehicles*

2.46 Under the *Sale of Goods and Supply of Services Act 1980*, there is an implied condition in every contract for sale of a motor vehicle that at the time of delivery of the vehicle under the contract it is free from any defect which would render it a danger to the public, including persons travelling in the vehicle.¹⁰⁰ A right of action may accrue to a person using a motor vehicle with the consent of the buyer of the vehicle, who suffers loss as a result of a breach of this implied condition.¹⁰¹ Under section 11(2)(d) into the *Statute of Limitations*

⁹⁵ Section 15, *Personal Injuries Assessment Board Act 2003*.

⁹⁶ *Ibid* at sections 49(4)-(6).

⁹⁷ *Ibid* at section 32.

⁹⁸ *Ibid* at sections 35 and 36.

⁹⁹ Section 50, *Personal Injuries Assessment Board Act 2003*.

¹⁰⁰ Section 13(2), *Sale of Goods and Supply of Services Act 1980*. This does not apply to a contract in which the buyer is a person whose business it is to deal in motor vehicles.

¹⁰¹ Section 13(7), *Sale of Goods and Supply of Services Act 1980*. This person may maintain an action for damages against the seller in respect of the breach as if that person were the buyer of the motor vehicle.

1957¹⁰² a 2-year limitation period applies to actions in respect of a breach of this implied condition, running from the date of accrual. A date of knowledge test applies to such of these actions “which consist of or include damages in respect of personal injuries to any person.”¹⁰³

(d) Defective Products: 1985 EC Directive and 1991 Act

2.47 Under the *Liability for Defective Products Act 1991*, which implemented the 1985 EC Directive on Liability for Defective Products, 85/374/EEC, a three year limitation period applies to defective products actions under the 1991 Act, running from the date on which the cause of action accrued or the date on which the plaintiff became aware of the damage, the defect and the identity of the producer of the defective product.¹⁰⁴ This is, effectively, a discoverability test. The plaintiff’s knowledge is construed in accordance with section 2 of the *Statute of Limitations (Amendment) Act 1991*.¹⁰⁵ Under the 1991 Act, and in accordance with the 1985 EC Directive, a long-stop of 10 years applies from the date on which the product was put into circulation.

2.48 The time limits prescribed under sections 9 and 48 of the *Civil Liability Act 1961* for actions surviving against the estate of the deceased and fatal injuries actions, respectively, do not apply to actions to recover damages in respect of defective products under the 1991 Act.¹⁰⁶ It should be noted that actions in respect of defective products may still be brought outside the terms of the 1991 Act; in other words, the 1985 EC Directive and the 1991 Act do not completely replace the common law rules of liability for defective products.

(e) Child Sexual Abuse

2.49 The *Statute of Limitations (Amendment) Act 2000* regulates the limitation period applicable to actions by adult plaintiffs in respect of sexual abuse suffered as a child. This Act inserts a new section 48A into the disability chapter of the *Statute of Limitations 1957*. Under section 48A, the running of the limitation period in respect of an action claiming damages in respect of sexual abuse suffered as a child is postponed during such period as the plaintiff is suffering from any psychological injury caused by the defendant’s acts. No long-stop period applies.

¹⁰² Section 11(2)(d), *Statute of Limitations 1957*, inserted by section 13(8), *Sale of Goods and Supply of Services Act 1980* .

¹⁰³ Section 3(3), *Statute of Limitations (Amendment) Act 1991*.

¹⁰⁴ Section 7, *Liability for Defective Products Act 1991*. This implemented Article 10 of the 1985 EC Directive on Liability for Defective Products, 85/374/EEC.

¹⁰⁵ Section 7(5), *Liability for Defective Products Act 1991*.

¹⁰⁶ Section 7(3).

- 2.50 The special limitation regime applies to the following actions:
- a. Actions founded on tort in respect of an act of sexual abuse suffered when the plaintiff was not of full age, and
 - b. Actions against a person (other than the person who committed the act), claiming negligence or breach of duty, where the damages claimed consist of or include damages in respect of personal injuries cause by such an act of sexual abuse.¹⁰⁷

2.51 Section 48A(1)(a) makes all actions founded on tort in respect of child sexual abuse subject to the special disability regime. Thus, actions in respect of trespass to the person (sexual abuse) and actions in respect of personal injuries are both subject to the special disability provisions. In practice, this means that the six year (general tort) and two year (PI) limitation periods do not begin to run until the plaintiff is deemed not to be suffering from a psychological injury.

2.52 The special limitation regime applies only if the sexual abuse perpetrated upon the plaintiff, as a child, resulted in a psychological injury to the plaintiff, as an adult. In order for a plaintiff to be deemed to be suffering from a psychological injury, two conditions must be fulfilled; first, the injury must have been caused, in whole or in part, by the defendant's act of sexual abuse, or any other act; and secondly, the injury must be of such significance that the plaintiff's will or ability to make a reasoned decision to bring an action is substantially impaired.¹⁰⁸ The psychological injury need not have resulted entirely from the child abuse suffered and its attribution may derive from 'any other act' of the defendant, other than the sexual abuse. Thus, even if the plaintiff is no longer suffering as a direct result of the abuse itself but his or her will to issue proceedings remains overborne, for example, by threats from the perpetrator, the running of the limitation period remains postponed.¹⁰⁹

2.53 Section 48A(2)(7) of the *Statute of Limitations 1957*, as amended, defines "an act of sexual abuse" so as to include:

- any act of causing, inducing or coercing a person to participate in any sexual activity,
- any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity, or

¹⁰⁷ Section 48A(1), *Statute of Limitations 1957*, inserted by section 3, *Statute of Limitations (Amendment) Act 2000*.

¹⁰⁸ Section 48A(1), *Statute of Limitations 1957*.

¹⁰⁹ See Noctor *The Statute of Limitations (Amendment) Act 2000: Implications for Parties to Actions Regarding Child Sexual Abuse* (2001) 19 ILT 126.

- any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature.¹¹⁰

2.54 These provisions apply to acts of sexual abuse perpetrated against persons up to the age of 21, up to March 1 1985,¹¹¹ and such acts perpetrated against persons up to the age of 18 after that date.¹¹²

2.55 The 2000 Act does not affect the courts' inherent jurisdiction to dismiss a claim the interests of justice so require, even where the claim is not statute-barred.¹¹³ This is further discussed in Chapter Seven (see page 313.)

(f) Non-Sexual Child Abuse

2.56 No special limitation period applies to actions in respect of non-sexual child abuse. Although the law is not entirely settled on the subject, it is arguable that civil actions seeking damages in respect of non-sexual abuse suffered as a child may be classified as either the following torts:

- Trespass to the person (*assault* and/or *battery*); or
- Personal Injuries (negligence and/or breach of duty).

2.57 Option (a) means that an adult who wishes to bring a civil action seeking damages in respect of non-physical abuse suffered as a child under the tort of *trespass to the person* has six years running from their 18th birthday to take the action.¹¹⁴ The prospective plaintiff may, therefore, commence proceedings at any time up to the day of his or her 24th birthday. The plaintiff's right to maintain the proceedings will, however, be subject to the court's jurisdiction to dismiss for want of prosecution.

2.58 Option (b) means that an adult who wishes to take a civil action seeking damages in respect of non-physical abuse suffered as a child under the

¹¹⁰ Section 48A(2)(7), *Statute of Limitations 1957*, inserted by section 2, *Statute of Limitations (Amendment) Act 2000*.

¹¹¹ See section 9(2) of the *Age of Majority Act 1985*: "This Act shall come into operation on the 1st day of March, 1985".

¹¹² Section 48A(2)(7), *Statute of Limitations 1957*.

¹¹³ Section 3, *Statute of Limitations (Amendment) Act 2000*: "Nothing in section 48(A) of the *Statute of Limitations 1957* (inserted by section 2 of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal".

¹¹⁴ Section 11(2), *Statute of Limitations 1957*.

tort of *negligence and/or breach of duty* giving rise to personal injuries, has two years running either from their 18th birthday, or from the date on which they are deemed to have sufficient 'knowledge' of the fundamental facts giving rise to their cause of action, whichever is later.¹¹⁵

2.59 Because no special limitation period applies to actions in respect of non-sexual child abuse, potential plaintiffs may find themselves statute-barred. This may occur, for example, where the abuse suffered as a child has resulted in psychological or psychiatric illness in adulthood. It is well-documented that persons who suffer abuse as children may, as adults, suffer from avoidance behaviour, post-traumatic stress disorder, repressed memory syndrome, psychological incapacity, and other long-term psychological and psychiatric damage.¹¹⁶ As a result, as the Commission noted in a previous Consultation Paper, the adult may be unable to recall the abuse and/or they may be unaware of the connection between the abuse and the resulting psychological or psychiatric damage. Even if the adult is armed with sufficient knowledge of the fundamental facts giving rise to the cause of action, he or she may nevertheless be immobilised from acting and therefore unable to institute proceedings.¹¹⁷

2.60 Further problems may arise owing to the unsettled nature of the continued availability of the discrete tort of *negligent* trespass to the person in Ireland. In England, this tort has effectively been subsumed into the tort of negligence, nuisance or breach of duty, to which a different limitation period applies when compared to tort actions.¹¹⁸ In Ireland, it may still fall under the category of trespass to the person, instead of falling within the definition of personal injuries provided in the 1991 Act. Its classification is important for limitation purposes.

2.61 The *Statute of Limitations (Amendment) Act 2000* does not apply to actions taken by adults in respect of non-sexual child abuse. It was suggested during the debates on the Bill that resulted in the 2000 Act that the scope of its provisions should be extended to include such actions. This proposal was motivated by the assertion that physical or sexual abuse, or a combination of both, involves the use of power and that the intent and effect of this abuse,

¹¹⁵ The 'date of knowledge' is defined in section 2 of the *Statute of Limitations (Amendment) Act 1991*.

¹¹⁶ See Law Reform Commission *Consultation Paper: The Law of Limitations of Actions arising from Non-Sexual Abuse of Children* (CP16-2000, September 2000), at 12-15.

¹¹⁷ *Ibid* at 12. See also Murphy *The Admissibility of Repressed Memories of Childhood Sexual Abuse* [2003] COLR 1.

¹¹⁸ See *A v Hoare* [2008] 2 WLR 311; *A v Hoare (No. 2)* [2008] EWHC 1573 (QB).

whether physical, sexual or a combination of both, can be as traumatic as sexual abuse.¹¹⁹ It was further proposed that if someone has been the victim of depravity, whether it is physical or sexual abuse, a special limitation regime is merited.¹²⁰ The proposal was opposed, however, as it was considered that forms of childhood abuse other than sexual abuse involved more complex questions. The then Minister noted:-

“It is very difficult to define precisely what kind of physical abuse should be actionable and what constitutes physical abuse. [...] The issues are not as clear cut with physical abuse as they are with sexual abuse.”¹²¹

(i) Previous Recommendations

2.62 In its Consultation Paper on this matter,¹²² the Commission provisionally recommended that a special limitations regime was necessary to accommodate the particular problems of the limitation of actions arising from non-sexual child abuse, but that separate limitation periods should apply in respect of sexual and non-sexual child abuse.¹²³

2.63 The Commission considered the following four options for reform:

- 1) A disability test in the mode of the 2000 Act
- 2) A discoverability test in the mode of the 1991 Act
- 3) A presumption of incapability as introduced in Ontario

¹¹⁹ Jan O’Sullivan TD, *Meeting of the Select Committee on Justice, Equality, Defence and Women’s Rights*, 20 October 1999.

¹²⁰ Jim Higgins TD, *Meeting of the Select Committee on Justice, Equality, Defence and Women’s Rights*, 20 October 1999.

¹²¹ Minister for Justice John O’Donoghue, *Meeting of the Select Committee on Justice, Equality, Defence and Women’s Rights*, 20 October 1999. He further stated that “Questions arise from the wide range of activities which, at one end of the scale, would have been classes, until not too long ago, as reasonable corporal punishment and, at the other end of the scale, would be unacceptable by any standards but may not affect the ability of the person to take legal proceedings at a given time. The Government’s view is that it needs to obtain the advice of experts on whether, and to what extent, other forms of abuse are likely to have the inhibiting effect on the victims, long into adult life, that is known to occur in many cases of childhood sexual abuse.”

¹²² Law Reform Commission *Consultation Paper: The Law of Limitations of Actions arising from Non-Sexual Abuse of Children* (LRC CP16-2000) at 2.

¹²³ *Ibid* at 89.

4) A statutory fixed limitation period, running from the age of majority.

2.64 The Commission provisionally favoured the introduction of a fixed limitation period, which would start to run once the potential plaintiff reached the age of majority. The Commission suggested that one of the following two periods should apply:

- A fixed, 15-year limitation period running from the age of majority, or
- A primary, 12-year limitation period running from the age of majority, subject to extension by no longer than three years at the discretion of the judge (thus a maximum of 15 years from age of majority).

2.65 The Commission recommended that a clear, certain, ascertainable and objective definition of “non-sexual abuse” of children should be set out in legislation so as to complement the definition of “sexual abuse” set out in the 2000 Act.

2.66 The Commission also recommended that the proposed limitations regime should be confined to situations in which there existed, at the time of the alleged abuse, a relationship of trust and dependency between the child and the defendant. Additionally, the Commission recommended that actions in respect of vicarious liability or other associated liability, including the responsibility of supervisory authorities, for acts of non-sexual child abuse should also be subject to a special limitations regime.¹²⁴

(g) Defective Premises

2.67 At present, actions in respect of defective premises against builders, vendors and lessors are dealt with at common law under the tort of negligence. Such actions are, therefore, subject to the standard six-year limitation period.¹²⁵ The date of accrual is governed by the common law.

2.68 In a Working Paper published in 1977, the Commission recommended the introduction of statutory duties concerning the liability of builders, vendors and lessors in respect of the quality and fitness of premises.¹²⁶ In its subsequent 1982 *Report on Defective Premises*, which included a draft *Defective Premises Bill*, the Commission envisaged two new statutory duties: first, a duty to build properly and second, a duty to ensure the safety from

¹²⁴ Law Reform Commission *Consultation Paper: The Law of Limitations of Actions arising from Non-Sexual Abuse of Children* (LRC CP16-2000) at 80.

¹²⁵ Section 11(2), *Statute of Limitations 1957*.

¹²⁶ Law Reform Commission *The Law relating to the Liability of Builders, Vendors, and Lessors for the Quality and Fitness of Premises* (Working Paper No 1 1977).

personal injuries and damage to property of persons who might reasonably be expected to be affected by defects in the state of the premises.¹²⁷

2.69 In the 1977 Working Paper, the Commission recommended the introduction of a 12-year limitation period for actions in respect of breach of such duties.¹²⁸ In the 1982 Report that followed, the Commission recommended that a discoverability test should apply to actions in respect of defective premises,¹²⁹ subject to personal injuries actions being dealt with under common law rules.¹³⁰ The Commission recommended against the introduction of a long-stop limitation period of 10 years in respect of defective premises actions, in the interests of fairness to the plaintiff.¹³¹

(h) Medical Negligence

2.70 The two-year limitation period that applies to personal injuries actions also applies to medical negligence claims¹³² (although it should be noted that such claims fall outside of the scope of the *Personal Injuries Assessment Board Act 2003*). It was argued forcibly during the Oireachtas debate on the *Civil Liability and Courts Act 2004* that medical negligence claims need a longer limitation period than two years, and are instead deserving of a special period of limitation. In favour of a longer period, several arguments were canvassed including the difficulty of getting expert witnesses, the trust that many patients repose in their doctors which may cause them to hesitate before initiating a claim against them, as well as the fact that the effective suspension of the

¹²⁷ Law Reform Commission *Report on Defective Premises* (LRC 3-1982) at paragraph 12.

¹²⁸ Law Reform Commission *The Law relating to the Liability of Builders, Vendors, and Lessors for the Quality and Fitness of Premises* (Working Paper No 1 1977) appendix 1, section 1(8) of the General Scheme of a *Defective Premises Bill*.

¹²⁹ Law Reform Commission *Report on Defective Premises* (LRC 3-1982) at paragraph 12. This was recommended following the receipt of submissions from the Dublin Solicitors' Bar Association as to latent defects.

¹³⁰ Law Reform Commission *Report on Defective Premises* (LRC 3-1982); section 8(a), *Defective Premises Bill 1982*, appendix B.

¹³¹ Law Reform Commission *Report on Defective Premises* (LRC 3-1982) at paragraph 12. The Construction Industry Federation made the suggestion of the long-stop.

¹³² Section 3(1), *Statute of Limitations (Amendment) Act 1991*.

limitation period during the PIAB assessment does not apply to medical negligence claims.¹³³

2.71 In this regard, Binchy notes that “forcing lawyers to initiate claims before the case has been properly prepared compromises the plaintiff, the defendant and the administration of justice.”¹³⁴ Indeed, the then Minister for Justice, Equality and Law Reform, speaking of the complexity of medical negligence cases, acknowledged as follows in the Seanad:

“[...] even an enthusiastic solicitor seeking to marshal all the facts and get all the relevant reports will be hard pressed to get much of the material lined up so that the barristers can advise the client, if it is a case that requires advice, on who the appropriate defendant should be and on whether it was the anaesthetist, the surgeon or the hospital who was responsible for the medical catastrophe. Also, obtaining medical reports here frequently requires going outside the country and the laying out of considerable amounts of money.”¹³⁵

2.72 Nevertheless, the Minister found “attractive” the argument that “if we have a general limitation period, it must be generally understood [...] by everybody as a general feature of our law.”¹³⁶ Putting forward a hypothetical scenario of a pedestrian injured by a negligent motorist and then treated by a doctor, the Minister argued that an extension of the limitation period for medical negligence claims to three years would tempt the injured pedestrian to make a claim for medical negligence in addition to his claim against the negligent motorist.¹³⁷ Binchy has argued that the Minister’s arguments in this regard are “not fully convincing”,¹³⁸ and he suggests that the hypothetical situation

¹³³ Binchy “The Impact of the New Act on Tort Law” in *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (Craven & Binchy eds., Dublin: Firstlaw, 2005) at 47.

¹³⁴ *Ibid.*

¹³⁵ Seanad Debates, 3 June 2004, *The Civil Liability and Courts Bill - Committee Stage*.

¹³⁶ *Ibid.*

¹³⁷ Select Committee on Justice, Equality, Defence and Women’s Rights, Dáil Éireann, 6 July 2004.

¹³⁸ Binchy “The Impact of the New Act on Tort Law” in *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (Craven & Binchy eds., Dublin: Firstlaw, 2005) at 47.

promulgated by the Minister in support of his contention is “clearly an exceptional one.”¹³⁹ The Minister further argued:

“Defensive medicine is also damaging to the national interest. Claiming that the boat must be put out for victims of medical negligence because they are a special category ignores that we want doctors to treat people in an effective and efficient way. It is not a public policy aim to encourage medical negligence claims and put them in a wholly different category from ordinary negligence claims. [...] I tend to believe that the pendulum may have swung too far in favour of liability. If one has a case in medical negligence, then bearing in mind the new law and the new time period which starts at the point of knowledge, which is quite generous in its own way, two years should be sufficient for people with claims against doctors to have those claims articulated, put in writing and commenced.”¹⁴⁰

2.73 There remains a degree of discontent with the application of the two-year limitation period to medical negligence claims. Binchy, for example, suggests that the Minister’s defence of the two-year period for medical negligence claims “does not address the concerns that were advanced in favour of a longer period.”¹⁴¹

(i) Breach of Constitutional Rights

2.74 In *Tate v The Minister for Social Welfare*, Carroll J. in the High Court held that the word “tort” in the *Statute of Limitations* was sufficiently wide to cover breaches of obligations of the State under European Community law, and that such a breach approximates to a breach of constitutional duty.¹⁴² The *Tate* decision was relied upon by one of the defendants in *McDonnell v Ireland*¹⁴³ as authority for the contention that even though the breach of a constitutional right is not expressly referred to in the *Statute of Limitations*, it is nevertheless a tort, i.e. a civil wrong for which the normal remedy is an action for unliquidated

¹³⁹ Binchy “The Impact of the New Act on Tort Law” in *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (Craven & Binchy eds., Dublin: Firstlaw, 2005) at 48.

¹⁴⁰ Select Committee on Justice, Equality, Defence and Women’s Rights, Dáil Éireann, 6 July 2004.

¹⁴¹ Binchy “The Impact of the New Act on Tort Law” in *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (Craven & Binchy eds., Dublin: Firstlaw, 2005) at 48.

¹⁴² *Tate v Minister for Social Welfare* [1995] 1 IR 418.

¹⁴³ *McDonnell v Ireland* [1998] 1 IR 134.

damages. Carroll J. in the High Court agreed, finding the plaintiff to be statute-barred. She held that it “flows logically” from her earlier decision that the limitation period applicable to torts under the *Statute of Limitations 1957* applies to breaches of a constitutional right that are in the nature of a tort as it does to breaches of obligations of the State under Community law.¹⁴⁴

2.75 The decision was appealed to the Supreme Court. Keane J¹⁴⁵ asked the following question:-

“Is there any reason why such an action, whatever its legal parameters, should not be regarded as an action founded on tort within the meaning of s. 11 (2) of the Act of 1957?”¹⁴⁶

2.76 Keane J. referred to the “dynamic nature” of the tort action, setting out its evolution and referring to the emergence of “new species of tortious principles”. He held that there was no reason to suppose that the Oireachtas legislated in 1957 on the basis that the law of torts was, at that stage, petrified for all time, albeit that they may not have envisaged the extent to which the developing constitutional jurisprudence of the Courts would, in later decades, reinforce the progressive development of the law of civil wrongs.¹⁴⁷ He answered his earlier question in the negative as follows:-

“Whatever may be the position in regard to other possible defences, no one has been able to identify in this case any ground for supposing that an action for breach of a constitutional right which has all the indicia of an action in tort should have a different limitation period from that applicable to actions in tort generally, or indeed no limitation period at all, other than its origin in the Constitution itself, which is a classically circular argument. Nor could it be seriously argued that the fact that the action for breach of a constitutional right frequently takes the form of proceedings against organs of the State is of itself a reason for treating a limitation statute as inapplicable.”¹⁴⁸

¹⁴⁴ *McDonnell v Ireland* [1998] 1 IR 134, 139.

¹⁴⁵ Hamilton CJ and O’Flaherty J. concurred. Barrington and Barr JJ. were more cautious - see *McDonnell v Ireland* [1998] 1 IR 134, 147 and 165.

¹⁴⁶ *McDonnell v Ireland* [1998] 1 IR 134, 156.

¹⁴⁷ *Ibid* at 59.

¹⁴⁸ *Ibid* at 159.

2.77 Keane J. then referred to the various policy considerations that underlie statutes of limitations, citing the judgment of Finlay CJ in *Tuohy v Courtney*¹⁴⁹, and concluded as follows:-

“I can see no reason why an actress sunbathing in her back garden whose privacy is intruded upon by a long-range camera should defer proceedings until her old age to provide herself with a nest egg, while a young man or woman rendered a paraplegic by a drunken motorist must be cut off from suing after three years. The policy considerations identified by the learned Chief Justice in the passage which I have cited are applicable to actions such as the present as much as to actions founded on tort in the conventional sense.”¹⁵⁰

2.78 More recently, in *Sinnott v Minister for Education*¹⁵¹ the plaintiffs brought a claim seeking damages in respect of an alleged breach of the State’s constitutional obligation to provide adequately for the first plaintiff’s education and training. Barr J. in the High Court, citing the judgment of Keane J. in *McDonnell*, held that claims for damages for breach of constitutional rights are analogous to common law actions in tort and the *Statute of Limitations 1957* applies to such claims. He found that as there was no corresponding duty in ‘ordinary’ law, it was appropriate to bring a constitutional action. Although the Supreme Court allowed the limited appeals that were brought in that case, it did not overturn the findings of Barr J. with respect to the *Statute of Limitations*.

(2) Contract Actions

2.79 There are three primary limitation periods applicable to actions in contract, which run for two, six and twelve years.¹⁵² In general, the limitation periods run from the date of accrual, which is the date on which the breach of contract occurs (not the date on which the damage is suffered). This is because the essence of a breach of contract is the breach, and not any resulting damage which may be occasioned by the breach.¹⁵³ Difficulties arise in determining the date of accrual in the event of a *continuing breach*, where a fresh breach occurs at each moment the contract remains unperformed. Continuing breaches should also be distinguished from a *recurring* or *successive breach of contract* which occurs where a contract requires recurring

¹⁴⁹ *Tuohy v Courtney* [1994] 3 IR 1, 48.

¹⁵⁰ *McDonnell v Ireland* [1998] 1 IR 134, 160.

¹⁵¹ *Sinnott v The Minister for Education & Ors* [2001] 2 IR 545.

¹⁵² See sections 11 and 12, *Statute of Limitations 1957*.

¹⁵³ Brady & Kerr *The Limitation of Actions* (2nd ed 1994) at 46.

performance of a series of dates. In this event, the cause of action accrues again and again on each occasion that the performance is not made.

(a) Actions to recover a Penalty or Forfeiture

2.80 A two-year limitation period to actions to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment. As with most contract actions, this limitation period runs from the date of accrual.¹⁵⁴ The present rule reflects the pre-1959 situation.¹⁵⁵

2.81 This limitation period does not apply to actions to recover fines to which any person is liable on conviction of a criminal offence.¹⁵⁶ Penalties for the non-payment of duties and taxes under the care and management of the Revenue Commissioner do not come within the remit of the Statute, as the non-payment of such duties are in reality criminal offences. The only field of operation of this limitation period is for the recovery of penalties by 'common informers'.¹⁵⁷

(b) Actions to recover sums owed by Tortfeasors

2.82 Under the *Tortfeasors Act 1951*, a jury may apportion damages in respect of a tort among all or some of the defendants in such proportions as it sees fit.¹⁵⁸ Any tortfeasor who has paid in excess of the amount apportioned to him or her may recover the lesser of the following from another tortfeasor who is not entitled to an indemnity¹⁵⁹:-

- i) the excess paid by the claimant tortfeasor, or
- ii) the amount by which the amount which the contributor has paid falls short of the amount apportioned to him or her.

¹⁵⁴ Section 11(7)(b), *Statute of Limitations 1957*.

¹⁵⁵ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1137.

¹⁵⁶ Section 11(7)(a), *Statute of Limitations 1957*.

¹⁵⁷ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1137.

¹⁵⁸ Section 4(1), *Tortfeasors Act 1951*. The jury is obliged to have regard to all the circumstances and the extent to which several defendants were respectively responsible for the injury.

¹⁵⁹ The jury may confer an indemnity on any one or more of the defendants: section 2(3), *Statute of Limitations 1957*.

2.83 This sum is considered a simple contract debt and, as such, a two-year limitation period applies to its recovery, running from the date of accrual.¹⁶⁰ The date of accrual is the date on which judgment was obtained by the injured person against the claimant tortfeasor.¹⁶¹

(c) Defective Vehicles Actions

2.84 Under the *Sale of Goods and Supply of Services Act 1980*, there is an implied condition in the contract of sale that at the time of delivery of the vehicle it is free from any defect which would render it a danger to the public, including persons travelling in the vehicle.¹⁶² A person using a motor vehicle with the consent of the buyer of the vehicle who suffers loss as the result of a breach of this implied condition may maintain an action for damages against the seller in respect of the breach as if he were the buyer.¹⁶³ Such actions must be taken within two years of the accrual of the cause of action.¹⁶⁴

(d) Simple and Quasi-Contract Actions

2.85 A six-year limitation period applies to the following actions:

- Actions founded on simple or quasi-contract,¹⁶⁵
- Actions to enforce a recognisance,¹⁶⁶ and
- Actions to recover seamen's wages.¹⁶⁷

2.86 This limitation period runs from the date of accrual. The provisions reflect the law as it stood prior to the enactment of the *Statute*.¹⁶⁸

¹⁶⁰ Section 4(3), *Tortfeasors Act 1951*.

¹⁶¹ Section 2(3), *Statute of Limitations 1957*.

¹⁶² Section 13(2), *Sale of Goods and Supply of Services Act 1980*.

¹⁶³ *Ibid* at section 13(7).

¹⁶⁴ Section 11(2)(d), *Statute of Limitations 1957*, inserted by section 13(8), *Sale of Goods and Supply of Services Act 1980*.

¹⁶⁵ Section 11(1) (a) and (b), *Statute of Limitations 1957*.

¹⁶⁶ *Ibid* at section 11(1)(c).

¹⁶⁷ *Ibid* at section 11(8)(a). The six-year limitation period does not apply to admiralty actions where the jurisdiction of the High Court is enforceable *in rem* or against the ship. *Ibid* at section 11(8)(b).

¹⁶⁸ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1135.

(e) Actions to recover sums recoverable by virtue of an enactment

2.87 A six-year limitation period applies to actions to recover any sum recoverable by virtue of any enactment.¹⁶⁹ Prior to the coming into force of the *Statute*, the limitation period for such actions was 20 years.¹⁷⁰ This limitation period applies to actions for fraudulent trading,¹⁷¹ but does *not* apply to actions to recover:

- i) A penalty or forfeiture or sum by way of penalty or forfeiture;¹⁷²
- ii) Debts owed by a member of a company or a contributory thereto;¹⁷³
- iii) An amount recoverable by a tortfeasor under sections 4 or 5 of the *Tortfeasors Act 1951*;¹⁷⁴ or
- iv) Actions requiring persons to remedy defects in the construction of a dwelling house by completing the construction in conformity with planning permission¹⁷⁵ - no limitation period applies in these cases.¹⁷⁶

(f) Actions to enforce an award

2.88 A six-year limitation period applies to actions to enforce an award where the arbitration agreement is not under seal, or where the arbitration is under any Act other than the *Arbitration Act 1954*.¹⁷⁷ A 12-year limitation period applies where the agreement is under seal.¹⁷⁸ The limitation periods both run

¹⁶⁹ Section 11(1)(e), *Statute of Limitations 1957*.

¹⁷⁰ Oireachtas Debates, Dáil Eireann, volume 154, March 01 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1135.

¹⁷¹ Under section 297(1) of the *Companies Act 1963*. See *Southern Mineral Oil Ltd (in liquidation) v Coonev* [1997] 3 IR 549, 561.

¹⁷² See section 11(7), *Statute of Limitations 1957*.

¹⁷³ Under sections 14(2) or 125 of the *Companies Consolidation Act 1908* - now repealed; see section 11(5)(c), *Statute of Limitations 1957*.

¹⁷⁴ See section 11(3), *Statute of Limitations 1957*.

¹⁷⁵ Section 27, *Local Government (Planning and Development) Act 1976*.

¹⁷⁶ See *Ellis v Nolan* (McWilliam J) 6 May 1983.

¹⁷⁷ Section 11(1)(d), *Statute of Limitations 1957*.

¹⁷⁸ *Ibid* at section 11(5)(b).

from the date of accrual, which occurs when the party against whom the award has been made fails to honour the award.¹⁷⁹

(g) Actions for an Account

2.89 Under section 11(4) of the *Statute of Limitations 1957* actions for an account cannot be brought in respect of any matter that arose more than six years before the commencement of the action.¹⁸⁰ This rule reflects the law as it stood prior to the commencement of the *Statute of Limitations 1957*,¹⁸¹ and was based on comparable provisions in section 2(2) of the UK *Limitation Act 1939*. It has long been recognised that the ancient common law action for an account had become obsolete before the enactment of the 1957 *Statute*¹⁸² so that the action for account referred to in the 1957 *Statute* must refer to the equitable remedy of account.

2.90 Whatever the nature of the action for an account, it is important to note that this remedy is rarely, if ever, applied for in its own right. Most claims for account are linked to another claim, such as a claim for damages (in which the claim for account assists in calculating the quantum of damages) or arising from, for example, a breach of fiduciary duty¹⁸³ or a statutory duty. In *Tito v Waddell (No.2)*,¹⁸⁴ the English High Court (Megarry VC) held that the limitation period in section 2(2) of the UK *Limitation Act 1939* (the basis for section 11(4) of the 1957 *Statute*) did not apply where the claim for an account was sought in the context of a separate equitable remedy.

2.91 It is notable that, since the *Tito* case, section 2(2) of the UK 1939 Act has been replaced by s.23 of the UK *Limitation Act 1980*, which is worded quite differently from its statutory predecessor, and states: “An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.” Section 23 of the 1980 Act has the effect of attaching any time limit in the 1980 Act itself that

¹⁷⁹ *Agromet & Motoimport v Maulden Engineering Co. Ltd* [1985] 1 WLR 762. See Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 200.

¹⁸⁰ Section.

¹⁸¹ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1136.

¹⁸² This was recognised over 50 years ago in 1958 (the year after the 1957 *Statute* was enacted and just before it came into operation in 1959) in *Halsbury's Laws of England* 3rd (Simonds) edition, vol.24, p.226, fn (k).

¹⁸³ See also the related equitable concepts of laches (delay) and acquiescence, discussed at paragraphs 2.196ff, below.

¹⁸⁴ [1977] 3 All ER 129.

applies to an action with which the claim for account is connected. In *Nelson v Rye*,¹⁸⁵ the English High Court (Laddie J) noted that the 1980 Act did not contain any limitation period for claims involving a breach of fiduciary duty. Thus, in that case, which was a claim for a breach of fiduciary duty brought by the well-known musician Willie Nelson - and in which a claim for account was included – the English High Court concluded that the claim was not subject to the six year time limit in s.23 of the UK *Limitation Act 1980*.

2.92 The Commission notes in this respect that where a specific cause of action is not subject to a limitation period in the *1957 Statute*, no limitation period applies to it, as where claims for account are brought on the basis of breach of a fiduciary duty, such as the duty of a trustee. The Commission notes later in this Chapter that, in connection with such duties, the courts developed related concepts such as laches (delay) and acquiescence to address the procedural fairness or unfairness that arises in such situations.¹⁸⁶ Bearing that in mind, the Commission considers that this long-standing approach of the law should continue to apply. It is, nonetheless, also apparent from cases such as *Tito v Waddell (No.2)* and *Nelson v Rye* that, even with the changes made by the UK 1980 Act, it is difficult to determine what, if any, limitation period applies in practice. The Commission has accordingly concluded that, in the context of a reformed law on limitation of actions, it should be clear that specific forms of civil litigation, such as claims for breach of a fiduciary duty, do not fall within the scope of any limitation period in the legislation on limitations.

2.93 *The Commission provisionally recommends that, in the context of a reformed law on limitation of actions, it should be clear that specific forms of civil litigation, such as claims for breach of a fiduciary duty, do not fall within the scope of any limitation period in the limitations legislation.*

(h) Actions upon an Instrument under Seal

2.94 Actions upon a specialty (i.e. a contract or other obligation contained in an instrument under seal)¹⁸⁷ must be brought within 12 years of the date of accrual of the cause of action.¹⁸⁸ This does *not* apply to actions to recover:¹⁸⁹

- (i) arrears of a rentcharge or conventional rent;¹⁹⁰

¹⁸⁵ [1996] 1WLR 1378.

¹⁸⁶ See paragraphs 2.196ff, below.

¹⁸⁷ Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 200.

¹⁸⁸ Section 11(5), *Statute of Limitations 1957*.

¹⁸⁹ *Ibid* at section 11(5)(a).

- (ii) any principal sum of money secured by a mortgage or other charge on land or personal property (other than a ship);¹⁹¹
- (iii) arrears of interest in respect of a sum of money;¹⁹²
- (iv) arrears of an annuity charged on personal property.¹⁹³

2.95 Prior to the commencement of the *Statute of Limitations 1957*, a 20-year limitation period applied to actions upon a contract brought about by a specific deed (i.e. registered, stamped and duly executed). It was considered that those who went to the trouble of drafting such a deed and having it stamped and registered attached more sanctity to the deed than would ordinarily be attached to a simple contract. The reduction in the time limit to 12 years was intended to reflect an increased tempo of modern living.¹⁹⁴

2.96 The reduction from 20 to 12 years mirrored a reduction implemented in England and Wales under the *Limitation Act 1939*. That reduction was the result of the recommendation of the Wright Committee which considered that there should be a longer limitation period for actions on a specialty than for actions of simple contract principally because difficulties of evidence were less likely to arise where the action was upon a contract under seal as opposed to actions upon a simple contract, which may not even be in writing. The Wright Committee also recommendation also reflected that:

“Money is frequently advanced on bonds or debentures or similar instruments, which is not expected or intended to be repaid for a long period and on which payment of interest is waived or suspended. It would be an inconvenience to insist that the lender should call in his lone within six years or lose his rights.”¹⁹⁵

¹⁹⁰ These actions are subject to a six year limitation period under sections 27 and 28, *Statute of Limitations 1957*.

¹⁹¹ These actions are subject to a twelve-year limitation period under section 36(1)(a), *Statute of Limitations 1957*, running from the date when the right to receive the money accrued.

¹⁹² See section 37, *Statute of Limitations 1957*.

¹⁹³ These actions are subject to a twelve year limitation period under section 31, *Statute of Limitations 1957*.

¹⁹⁴ Oireachtas Debates, Seanad Eireann, volume 47, January 16 1957, *Statute of Limitations Bill 1954 – Second Stage* at 63.

¹⁹⁵ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at 9.

2.97 The choice of 12 years was based in particular on “the desirability of fixing the same period for an action brought upon a covenant, whether in a mortgage deed, or in a deed without security, as for an action to recover land.”¹⁹⁶

(i) Speciality Debts - Company Law

2.98 Under the *Statute of Limitations 1957* as enacted a 12-year limitation period applied to actions to recover “a debt created by subsection (2) of section 14 or section 125 of the *Companies (Consolidation) Act, 1908*”. The debt created by section 14(2) of the 1908 Act was a debt owed by a member of a company under the memorandum and articles of a company,¹⁹⁷ while the debt created by section 125 was a debt owed by a contributory.¹⁹⁸ Both of those debts were classified as ‘specialty debts’ under the 1908 Act which was repealed by the *Companies Act 1963*.¹⁹⁹ The 1963 Act provides however that a 12 year limitation period applies to equivalent debts²⁰⁰ The *Companies Act 1963* does not repeal the relevant section of the *Statute of Limitations 1957*.

(j) Specific Performance

2.99 The provisions of the *Statute of Limitations 1957* do not apply to any claim for specific performance of a contract, or for an injunction or for other equitable relief except in so far as they may be applied by analogy. Such claims may, however, be barred by *laches* or acquiescence which are discussed more fully below.

(3) Miscellaneous Actions

2.100 The following is a non-exhaustive examination of the limitation periods applicable to some common causes of action. As already noted in the Introduction to this Paper, the Commission intends to focus on the most

¹⁹⁶ *Ibid* at 9.

¹⁹⁷ See section 14(2), *Companies (Consolidation) Act 1908* (8 Edw. 7, c. 69): “all money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be of the nature of a speciality debt.”

¹⁹⁸ *Ibid* at section 125: “The liability of a contributory shall create a debt (in England and Ireland of the nature of a specialty) accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.” For a definition of the term “contributory”, see *ibid* at section 124 and section 208, *Companies Act 1963*.

¹⁹⁹ Section 3 & Schedule 12, *Companies Act 1963*.

²⁰⁰ *Ibid* at sections 25(2) and (3), 209(1) and (2) respectively.

common forms of civil actions. The following discussion is, however, intended to reflect some recurring trends in the principles applicable to limitation periods.

(a) Actions upon a Judgment

2.101 Where judgment is obtained from a court of record, a 12-year limitation period applies to actions upon that judgment. The limitation period begins to run from the date on which the judgment became enforceable.²⁰¹ In the event of an appeal, the limitation period runs from the date of the appeal court's judgment.²⁰²

2.102 A six-year period applies to actions to recover arrears of interest in respect of a judgment debt, running from the date on which the interest became due.²⁰³

(b) Successive Conversions / Wrongful Detentions

2.103 Conversion is an unauthorised act by one person which deprives another person of his property permanently or for an indefinite time. A right of action for conversion arises on the doing of the unauthorised act. An action for conversion is one for damages. Wrongful detention occurs where one person detains the property of another. The right of action arises when a demand of the owner has been wrongfully refused. The remedy sought in an action for wrongful detention is restitution of the property.

2.104 Prior to the commencement of the *Statute of Limitations 1957*, when the same chattel was the subject of separate acts of conversion or detention, the fact that the limitation period had run in favour of the first wrongdoer did not bar an action against a second or subsequent wrongdoer.²⁰⁴ The *Statute of Limitations 1957* set a new, six-year limitation period for actions in the case of successive conversions or detention of a chattel. The new limitation period runs from the date of accrual of the cause of action in respect of the original wrongful

²⁰¹ Section 11(6)(a), *Statute of Limitations 1957*. The date on which a judgment is enforceable is the date on which it is pronounced, rather than the date on which judgment is entered. See e.g. *Holtby v Hodgson* (1890) 24 QBD 103; *Hodgins v Harris Investors Ltd* [1929] 1 DLR 189; *Fontaine v Heffner* (1983) 144 DLR (3d) 572. See further Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 199.

²⁰² *Roddy v Atkinson* [1949] 3 DLR 328. See further Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 199.

²⁰³ Section 11(6)(b), *Statute of Limitations 1957*.

²⁰⁴ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1138.

conversion or detention.²⁰⁵ This is subject to the provisions of the *Statute* which govern actions to recover settled chattels.²⁰⁶

2.105 The expiry of the six-year limitation period for bringing an action for conversion or wrongful detention extinguishes the title of the chattel concerned.²⁰⁷ This represents a change in the law, as it was previously the case that only the right of action was barred at the expiry of the limitation period.²⁰⁸

(c) Admiralty / Salvage Actions

2.106 Although the *Statute of Limitations 1957* applies to actions to recover seamen's wages, it does not apply to any cause of action that falls within the admiralty jurisdiction of the High Court, which is enforceable *in rem* (against the ship).²⁰⁹

2.107 Salvage claims were formerly governed by the *Maritime Conventions Act 1911*, which set a two-year limitation period for such claims. The limitation period began to run on the date on which the damage, loss or injury was caused or the salvage services were rendered.²¹⁰ This provision was however repealed by the *Civil Liability Act 1961*²¹¹ and replaced with a two-year limitation period applicable to actions to enforce a claim for damages or lien in respect of damage caused to a vessel, cargo or property on board a vessel, or loss of life or personal injury suffered by any person on board. The limitation period runs from the date on which the damage, loss of life or injury was caused.²¹²

2.108 In an unusual innovation in terms of limitation periods at that time, the 1961 Act grants the courts discretion to extend the two-year limitation period to such extent and subject to such conditions as the courts see fit²¹³ (a similar discretionary power is included in s.38 of the *Defamation Act 2009*). Additionally, if the court is satisfied that there has not been, during the two-year

²⁰⁵ Section 12(1), *Statute of Limitations 1957*.

²⁰⁶ *Ibid* at section 26.

²⁰⁷ Section 12(2), *Statute of Limitations 1957*.

²⁰⁸ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1138.

²⁰⁹ Section 11(8), *Statute of Limitations 1957*.

²¹⁰ Section 8, *Maritime Conventions Act 1911* (1 & 2 Geo. 5. c.57).

²¹¹ Section 5 and Schedule (Part 3), *Civil Liability Act 1961*.

²¹² Section 46(2), *Civil Liability Act 1961*.

²¹³ *Ibid* at section 46(3).

limitation period, any opportunity of arresting the defendant vessel within the jurisdiction of the court or within the territorial waters of the country to which the plaintiff's vessel belongs or in which the plaintiff resides or has his principal place of business, the court *must* extend the limitation period to an extent sufficient to give the plaintiff this reasonable opportunity.²¹⁴

2.109 An action for any claim for contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries must be commenced within one year from the date of payment.²¹⁵

(d) Actions for a Contribution

2.110 Two or more persons may be 'concurrent wrongdoers' when they are both or all responsible for the same damage to the injury person.²¹⁶ A concurrent wrongdoer may recover a contribution from any other wrongdoer who is or would have been liable, if sued, in respect of the same damage.²¹⁷ An action for a contribution must be brought within the greater of the following limitation periods:

- i) Such period of time as the injured person is allowed by law for bringing an action against the contributor, or
- ii) Within *two years* after the liability of the concurrent wrongdoer who is seeking the contribution is ascertained, or
- iii) Within *two years* after the injured person's damages are paid.²¹⁸

(e) Revenue Actions

2.111 Section 3 of the *Statute of Limitations 1957* governs the application of the *Statute* to the State. Pursuant to section 3(2)(1) of the *Statute*, the provisions of the *Statute* do not apply to the following actions:

- Proceedings for any sum due in respect of a tax or duty that is (for the time being) under the care or management of the Revenue Commissioners, or any interest due on such sums;
- Proceedings for the recovery of any fine, penalty or forfeiture incurred in connection with any tax or duty which is for the time being under the care and management of the Revenue Commissioners;

²¹⁴ *Ibid* at section 46(3).

²¹⁵ Section 46(2), *Civil Liability Act 1961*.

²¹⁶ *Ibid* at section 11(1).

²¹⁷ *Ibid* at section 21(1).

²¹⁸ *Ibid* at section 31. See further *Keane v Western Health Board* [2006] IEHC 370.

- Forfeiture proceedings under the *Customs Acts* or the Acts which relate to the duties of excise and the management of those duties.

2.112 It is beyond the remit of this Consultation Paper to examine each and every limitation period applicable to revenue actions. The discussion below is merely a flavour of the limitation periods that might be most relevant to individual taxpayers. It should be noted that in other jurisdictions, special considerations have been found to apply to actions to recover tax such that these actions should not be subject to a core limitations regime.

(i) Actions to Recover Penalties incurred

2.113 A six-year limitation period applies to actions to recover penalties incurred.²¹⁹ A three-year limitation period applies to actions to recover penalties incurred by a person who has since died, running from the year in which the deceased person died in a case in which a grant of probate or letters of administration were made in that year. A two year limitation period applies where such grant was made in any other case. These limitation periods are subject to the proviso that where the personal representative lodges a corrective affidavit for the purposes of assessment of estate duty after the year in which the deceased person died. In such cases, the proceedings must be commenced within two years of the year in which the corrective affidavit was lodged.²²⁰

(ii) Making of an Estimation

2.114 A four-year limitation period applies to the making of an estimation by the Revenue Commissioners in respect of tax payable by an accountable person, in respect of any taxable period commencing on or after 1st May, 1998; a six-year limitation period applies to the making of an estimation in respect of any taxable period commencing before that period.²²¹ This represents a reduction from the six and ten year limitation periods applicable up to 2003 to those taxable periods, respectively.²²²

²¹⁹ See section 30(1), *Value-Added Tax Act 1972*, as amended by section 191, *Finance Act 1992*.

²²⁰ See section 30(3), *Value-Added Tax Act 1972*, as amended by section 20, *Value-Added Tax (Amendment) Act 1978*; section 191, *Finance Act 1992*; section 114(a), *Finance Act 1998*.

²²¹ Such an estimation may be carried out under sections 22 and 23 of the *VAT Act 1972*, as amended.

²²² See section 30(4)(a)(i) and (ii), *VAT 1972*, as amended by section 191, *Finance Act 1992*; section 115, *Finance Act 1998*; section 129, *Finance Act 2003*; section 119, *Capital Acquisitions Tax Consolidation Act 2003*.

2.115 These limitation periods runs from the end of the taxable period to which the estimate relates or, where the period in respect of which the estimate is made consists of two or more taxable periods, the end of the earlier or earliest taxable period comprised in such period.

2.116 No limitation period applies in either case to the making of an estimation where any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to tax; in such cases, an estimation may be made “at any time for any period for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer.”²²³

(iii) Actions to Recover Taxes paid

2.117 A four year period applies in respect of actions by taxpayers seeking a refund of tax. This represents a reduction from the ten year period that previously applied.²²⁴

(f) Malicious Injuries

2.118 Under the *Malicious Injuries Act 1981*,²²⁵ if damage exceeding a particular sum is maliciously caused to property in certain circumstances, the person who suffers the damage is entitled to claim compensation from the local authority.²²⁶ A preliminary notice of intention to apply for compensation must be served within fourteen days of the damage being caused.²²⁷ The date of service of this notice is treated as the date of accrual of the cause of action,²²⁸ and proceedings must be commenced within three years of this date.²²⁹ The running of the limitation period will be postponed in the event of disability in accordance with section 49 the *Statute of Limitations 1957*.²³⁰

²²³ *Ibid.*

²²⁴ See section 20(4), *VAT Act 1972*, as amended by section 114 of the *Finance Act 1998* and section 124 of the *Finance Act 2003*. See also section 20(5)(a)-(f), *Value Added Tax Act 1972*, as inserted by section 184, *Finance Act 1992* and as amended by section 114(b), *Finance Act 1998*, section 116, *Finance Act 2000*, section 124, *Finance Act 2003*

²²⁵ As amended by the *Malicious Injuries (Amendment) Act 1986* and the *Post and Telecommunications Act 1983*.

²²⁶ Section 5(1), *Malicious Injuries Act 1981*, as amended by section 2(1), *Malicious Injuries (Amendment) Act 1986*.

²²⁷ Section 8(1), *Malicious Injuries Act 1981*.

²²⁸ *Ibid* at section 23(2).

²²⁹ *Ibid* at section 23(1).

²³⁰ *Ibid* at section 23(3).

(4) Actions to Recover Land

2.119 The limitation periods applicable to actions to recover land are governed by section 13 of the *Statute of Limitations 1957*. The limitation periods set out in that section apply to registered land as they do to unregistered land.²³¹ Different limitation periods apply depending on whether the action is taken by a “State authority”²³² or by a person other than a State authority, and also depending on whether or not the land is foreshore.²³³

2.120 Actions to recover land by a person other than a State authority are subject to a 12-year limitation period, running from the date of accrual.²³⁴ This reflects the rule that applied prior to the commencement of the *Statute*. As seen above, the 12-year period represents a reduction from the 20-year period that had been fixed under the *Limitation Act 1623* and which was applicable until the coming into force of the *Real Property Limitation Act 1874*.

2.121 Actions to recover land (except foreshore) by a Statute authority are subject to a 30-year limitation period, running from the date of accrual.²³⁵ This represents a reduction from the 60-year limitation period that applied prior to the commencement of the *Statute*.²³⁶ The Oireachtas initially considered the application of a 40-year limitation period to such actions, so as to accord with the requirement at that time that the vendor of land on an open contract show 40 years’ title,²³⁷ but the 30-year period was introduced so as to be in line with

²³¹ Section 49, *Registration of Title Act 1964*.

²³² “State authorities” include a Minister of State, the Commission of Public Works in Ireland, the Irish Land Commission, the Revenue Commissioners, or the Attorney General. Section 2(1), *Statute of Limitations 1957*.

²³³ “Foreshore” is defined so as to include the bed and shore, below the line of high water of ordinary or medium tides, of the sea and of every tidal river and tidal estuary and of every channel, creek, and bay of the sea or of any such river or estuary. Section 2(1), *Statute of Limitations 1957*.

²³⁴ Section 13(2)(a), *Statute of Limitations 1957*.

²³⁵ *Ibid* at section 13(1)(a).

²³⁶ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1138.

²³⁷ See section 1, *Vendor and Purchaser Act 1874* (37 & 38 Vict., c.78).

the English model.²³⁸ It is notable that the 40 years title requirement has been reduced to 15 years in the *Land and Conveyancing Law Reform Act 2009*.

2.122 Actions by a State authority to recover land that is foreshore are subject to a 60-year limitation period, again running from the date of accrual.²³⁹ This is the same period as applied prior to the commencement of the *Statute*.²⁴⁰ The retention of this very lengthy limitation period has been explained in terms of a greater public interest in the right to recover foreshore.²⁴¹ It is possible that the 60-year limitation period derives from the pre-1874 situation where all actions by the Crown to recover land were, under the *Nullum Tempus Acts*, subject to a 60-year limitation period, given that a vendor of land on an open contract was obliged, at that time, to show 60 years' title.

2.123 Land may, of course, cease to be foreshore but remain in the ownership of the State. If a right of action to recover this land accrues before the land ceases to be foreshore, a dual limitation period applies: the limitation period runs either for 40 years from the date on which it ceased to be foreshore, or for 60 years from the date of accrual, whichever period expires first.²⁴²

2.124 With respect to the date of accrual of an action to recover land by a State authority, there are three relevant dates:

- i) Before December 6, 1922: when the action accrued to the Crown;
- ii) Before December 29, 1937: when the action accrued to Saorstát Éireann;
- iii) Before January 1, 1959:²⁴³ when the action accrued to the State.²⁴⁴

2.125 In each case, the action is deemed to have accrued to a "State authority" on the date on which it accrued to the relevant party, i.e. the Crown, Saorstát Éireann, or the State.

²³⁸ Oireachtas Debates, Seanad Éireann, volume 47, 16 January 1957, *Statute of Limitations Bill 1954 – Second Stage* at 63.

²³⁹ Section 13(1)(b), *Statute of Limitations 1957*.

²⁴⁰ Oireachtas Debates, Dáil Éireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1139.

²⁴¹ Oireachtas Debates, Seanad Éireann, volume 47, 16 January 1957, *Statute of Limitations Bill 1954 – Second Stage* at 67.

²⁴² Section 13(1)(c), *Statute of Limitations 1957*.

²⁴³ The date of commencement of the *Statute of Limitations 1957*.

²⁴⁴ See further Oireachtas Debates, Dáil Éireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1139.

2.126 Given that the longest period for the commencement of an action to recover land is 60 years, the accrual of a cause of action before the formation of the State cannot now be said to be relevant, particularly in the absence of a generally-applicable discoverability test.

(a) Equitable Estates in Land; Land held on Trust; Settled Chattels

2.127 Despite the convergence of common law and equity, there remain in Ireland both legal and equitable estates in land. Likewise, there remain both common law and equitable remedies. The provisions of the *Statute of Limitations 1957* apply to equitable estates in land, including interests in the proceeds of the sale of land held upon trust for sale, in the same manner as they apply to legal estates in land.²⁴⁵ Actions to recover equitable estates in land accrue to the person entitled in possession to an equitable estate in land in the same manner and circumstances and on the same date as it would accrue if his or her estate were a legal estate in the land.²⁴⁶ These principles also apply to actions to recover settled chattels.²⁴⁷

(b) Actions to Recover Arrears

2.128 A six-year limitation period applies to actions brought or distress made to recover arrears of rentcharges,²⁴⁸ conventional rent,²⁴⁹ or annuities charged on personal property.²⁵⁰ These limitation periods run from the date on which the arrears fall due.²⁵¹

2.129 The *Statute* also sets a six-year limitation period for actions brought or distress made to recover arrears of dower.²⁵² At the time of enactment of the

²⁴⁵ Section 25(1), *Statute of Limitations 1957*.

²⁴⁶ *Ibid* at section 25(1).

²⁴⁷ *Ibid* at section 26(1).

²⁴⁸ *Ibid* at section 27(1), *Statute of Limitations 1957*. Rentcharges are annuities or periodic sums of money charged upon or payable out of land. See *ibid* at section 2(1). This limitation period does not apply to proceedings under section 37, *Land Act 1927* (i.e. proceedings for an order for possession of holdings which are liable to be sold by the Land Commission), as amended by section 19, *Land Act 1953*. See section 27(2), *Statute of Limitations 1957*.

²⁴⁹ Section 28, *Statute of Limitations 1957*. Conventional rent is a rent payable under a lease or contract of tenancy. *Ibid* at section 2(1).

²⁵⁰ *Ibid* at section 31.

²⁵¹ *Ibid* at sections 27(1), 28 and 31.

²⁵² *Ibid* at section 29.

Statute, a widow had a right of dower over one-third of her husband's land held for estates of inheritance (i.e. fee simple, fee tail), provided that her children could inherit them.²⁵³ Dower has since been abolished²⁵⁴ but the limitation period for actions to recover arrears of dower remains on the statute-book.

2.130 In addition, the *Statute* set a six-year limitation period for the issue of a warrant by the Land Commission to the relevant county registrar or sheriff to levy arrears of money due and payable by a defaulter.²⁵⁵ The limitation period ran from the date on which the amount of money became due and payable,²⁵⁶ and the warrant would remain in force for a maximum of six years from the date of issue.²⁵⁷ Thus, the warrant would cease to be force after six years and the Land Commission could not recover any more than six years' annuities on a warrant issued. The Land Commission ceased to acquire land in 1983 and was dissolved on 31 March 1999 pursuant to section 2 of the *Irish Land Commission (Dissolution) Act 1992*.²⁵⁸ The administrative functions of the Land Commission were transferred to the Department of Agriculture and its judicial functions were transferred to the President of the High Court.²⁵⁹ The provisions of the *Statute of Limitations 1957* governing the grant of a warrant by the Land Commission have not been repealed.

(c) Actions in respect of Mortgages and Charges

2.131 Sections 32 to 42 of the *Statute of Limitations 1957* govern the limitation of actions in respect of mortgages and charges. Under section 2(1) of the *Statute*, a 'mortgage' includes an equitable mortgage and a judgment mortgage. The term "mortgagor" and "mortgagee" and similar terms are construed accordingly.

2.132 Part 9 of the *Land and Conveyancing Law Reform Act 2009* makes fundamental changes to the substantive law in this respect,²⁶⁰ by making a

²⁵³ See Andrew Lyall *Land Law in Ireland* (2nd ed 2000) at 243-4.

²⁵⁴ See section 11(2), *Succession Act 1965*.

²⁵⁵ Section 28, *Land Act 1933*, as amended by section 17, *Land Act 1936*.

²⁵⁶ Section 29(1), *Statute of Limitations 1957*.

²⁵⁷ *Ibid* at section 29(2).

²⁵⁸ See the *Irish Land Commission (Dissolution) Act 1992 (Commencement) Order 1999* (SI No. 75 of 1999).

²⁵⁹ See sections 3 and 4, *Irish Land Commission (Dissolution) Act 1992*.

²⁶⁰ The 2009 Act implemented the key recommendations in the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC-74 2005).

charge the sole method of creating a legal mortgage. When the 2009 Act comes into force,²⁶¹ mortgages by conveyance or assignment of the borrower's estate or interest in the land, or by demise in the case of leasehold land, will be abolished, so that it will no longer be possible to create a legal mortgage. Mortgages created prior to the coming into force of the 2009 Act will continue to be covered by the pre-2009 law under which the mortgage formed part of the title to the land.

(i) Actions by Mortgagees

2.133 In the event of non-payment of a mortgage debt by the mortgagor, the mortgagee gains the right to enforce the security. This includes the right to possess, to appoint a receiver, and/or to sell.²⁶² The mortgagee may also have a personal action for debt against the mortgagor where a loan has been made.²⁶³ For the purpose of limitation, there is an important distinction between the date on which these powers vest in the mortgagee (i.e. the legal date for redemption), and the date when the mortgagee can exercise those powers, which is usually when some default by the mortgagor occurs.

2.134 Limitation periods are established under the *Statute* in respect of the following actions by mortgagees to enforce their security:²⁶⁴

- For delivery of possession of land;²⁶⁵ – 12 years
- Claiming sale of land:

²⁶¹ At the time of writing (July 2009), no Commencement Order has yet been made for the 2009 Act.

²⁶² In theory, it also includes the right to foreclose. The mortgagee's right to foreclose traditionally involved obtaining a court order destroying the mortgagor's right of redemption, thereby leaving the mortgagee as the owner of the land. Irish courts determined over a century ago to stop granting foreclosure, and have since preferred to grant an order for the sale of land. The Commission recommended the abolition of the remedy of foreclosure in its *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004), stating, at paragraph 9.16: "The time has come to consign the remedy to history." Section 96(2) of the *Land and Conveyancing Law Reform Act 2009* abolishes foreclosure.

²⁶³ Pearce & Mee *Essential Law Texts: Land Law* (2nd ed Round Hall: Sweet & Maxwell 2000) at 267.

²⁶⁴ See also the Financial Regulator's 2009 *Code of Practice on Mortgage Arrears* setting out a moratorium on bringing proceedings for possession.

²⁶⁵ This comes within the definition provided in section 2(1) of "actions to recover land" and is, therefore, subject to the general, 12-year limitation period provided in section 13(2), *Statute of Limitations 1957*.

- Actions by State authorities – 30 years²⁶⁶
 - Actions by persons other than State authorities – 12 years²⁶⁷
- To recover principal money secured by:
 - A mortgage or charge on property;²⁶⁸
 - Various mortgages involving the State – 30 years²⁶⁹
- To recover arrears of interest on a mortgage or charge – 6 years²⁷⁰
- In respect of personal rights over the land – 12 years²⁷¹
- To recover arrears of interest on a chattel mortgage – 6 years.²⁷²

2.135 The Commission has recommended that the current approach to the mortgagee’s remedies should be changed to reflect modern practice, and has suggested that in future, the remedies available to mortgagees should be based firmly on the security interest of the mortgagee and should not be exercisable unless and until it becomes necessary to protect that security or to realise it in order to obtain repayment of the outstanding debt, including interest.²⁷³ Sections 96 to 111 of the *Land and Conveyancing Law Reform Act 2009*, when brought into force,²⁷⁴ will implement these recommendations and will govern the

²⁶⁶ Section 32(1), *Statute of Limitations 1957*.

²⁶⁷ Section 32(2)(a), *Statute of Limitations 1957*. This is subject to section 32(2)(b) which governs the situation where the right of action first accrued to a State authority but is being taken by a person other than the State authority.

²⁶⁸ Section 36(1)(a), *Statute of Limitations 1957*. This does not apply to money secured by a mortgage or charge on a ship. The limitation period runs from the date when the right to receive the money accrued.

²⁶⁹ Section 36(1)(b), *Statute of Limitations 1957*.

²⁷⁰ Section 37(1), *Statute of Limitations 1957*. This is subject to the qualifications contained in subsections (2) and (3) of section 37.

²⁷¹ Section 40, *Statute of Limitations 1957*.

²⁷² Section 42, *Statute of Limitations 1957*. See further section 26 of the *Agricultural Credit Act 1947*.

²⁷³ Law Reform Commission *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP-34, 2004) paragraph 9.14.

²⁷⁴ At the time of writing (July 2009), no Commencement Order has yet been made for the 2009 Act.

obligations, duties and rights of mortgagees, particularly the remedies available to enforce the mortgagee's security.²⁷⁵

(ii) Actions of Redemption by Mortgagors

2.136 Sections 34 and 35 of the *Statute* govern the limitation of actions by mortgagors to redeem mortgaged land that is in the possession of the mortgagee. The legal date of redemption is generally specified in the terms of the mortgage. The right to redeem accrues to a mortgagor on the legal date of redemption specified in the mortgage. Equity plays a particular role in actions of redemption. The role of equity has been to ensure that the mortgagor can redeem the mortgage even after the legal date of redemption has passed. It has become common practice for mortgage deeds to specify a short legal date for redemption (i.e. 3 or 6 months after taking out the mortgage), with the mortgagor thereafter having to rely on the equity of redemption,²⁷⁶ which means that "the mortgagor is entitled to get back his property as free as he gave it, on payment of principal, interest and costs, and provisions inconsistent with that right cannot be enforced."²⁷⁷

2.137 Under section 34(1)(a) of the *Statute*, a 12-year limitation period applies to actions by a mortgagor to redeem his title to land. This runs from the date on which the mortgagee enters into possession of the mortgaged land. Under section 34, where a mortgagee has been in possession of any of the mortgaged land for 12 years, the mortgagor (or any person claiming through the mortgagor) cannot bring an action to redeem the land. The mortgagor must, therefore, bring an action to redeem his title to the land within 12 years of the mortgagor entering into possession thereof. This is an exception to the general rule that in order for the limitation period to start running, there must be adverse possession of the land.²⁷⁸

²⁷⁵ These provisions, based on section 99 of the *Draft Land Law and Conveyancing Reform Bill* contained in the Law Reform Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), are intended to ensure that lenders' remedies to enforce security are exercised only when appropriate. Oireachtas Debates, Seanad Éireann, volume 184, June 20 2006, *Land and Conveyancing Law Reform Bill 2006 – Second Stage*.

²⁷⁶ Law Reform Commission *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (2004) at paragraph 9.13.

²⁷⁷ *Browne v Ryan* [1901] 2 IR 653, 676 (Walker LJ), cited in Lyall *Land Law in Ireland* (2nd ed Round Hall: Sweet & Maxwell 2000) at 812-3.

²⁷⁸ This exception carried on from the *Real Property Limitation Acts*. See Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations – Second Stage* at 1145.

2.138 The 12 year limitation period begins to run anew from the date of acknowledgement by the mortgagee of the title of the mortgagor,²⁷⁹ and/or from the date on which the mortgagee receives any payment in respect of the principal or interest of the mortgage debt.²⁸⁰

(iii) The Redemption of Welsh Mortgages

2.139 Welsh mortgages are a form of possessory security whereby the mortgagee retains possession of the mortgaged land and retains any rents and profits from that land until the capital is repaid or, alternatively in lieu of the repayment of the capital.²⁸¹ A 12 year limitation period applies in respect of actions to redeem land that was subject to a Welsh mortgage, but only where that mortgage provided that the rents and profits were to be applied in reduction of the principal moneys and interest. This limitation period commences only after all the interest and principal moneys have been satisfied. It follows that where a mortgagee has been in possession of the land for a period of 12 years after this date, the mortgagor (or any person claiming through the mortgagor) cannot thereafter bring an action to redeem the land. So, the mortgagor must bring an action to redeem the land within 12 years of all the interest and principal moneys being satisfied.²⁸²

2.140 Section 88 of the *Land and Conveyancing Law Reform Act 2009*, when brought into force,²⁸³ will implement the Commission's recommendation to abolish Welsh mortgages,²⁸⁴ deeming them "inconsistent with the trust purpose of a mortgage."²⁸⁵

²⁷⁹ Section 54, *Statute of Limitations 1957*.

²⁸⁰ *Ibid* at section 64.

²⁸¹ See *ibid* at section 34(1)(b); Pearce & Mee *Essential Law Texts: Land Law* (2nd ed Round Hall: Sweet & Maxwell 2000) at 259-60; Lyall *Land Law in Ireland* (2nd ed Round Hall: Sweet & Maxwell 2000) at 778-79; Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 698-99.

²⁸² Section 34(2), *Statute of Limitations 1957*.

²⁸³ At the time of writing (July 2009), no Commencement Order has yet been made for the 2009 Act.

²⁸⁴ Law Reform Commission *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) at paragraph 9.05.

²⁸⁵ Law Reform Commission *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) at 252.

(d) Accrual / Adverse Possession

2.141 The accrual of actions to recover certain interests in land (such as present or future interests) is governed by sections 14 to 17 of the *Statute*. These sections set out the earliest date, in each case, when an action may be brought. It is from this date that the limitation period is to run.²⁸⁶

2.142 Under the *Statute*, in order for a right of action to recover the land to have accrued there must be adverse possession of land.²⁸⁷ Put another way, the doctrine of adverse possession dictates that a limitation period will not begin to run against a plaintiff and in favour of a defendant until possession that is adverse to that of the owner of land is taken by some person in whose favour the limitation period can run. As a general rule, twelve years of uninterrupted adverse possession of land will result in the dispossession of the original owner of the land. No right of action will be deemed to have accrued unless and until adverse possession is taken of the land where:²⁸⁸

- i) A right of action to recover land is deemed to accrued on a certain date, and
- ii) No person is in adverse possession of the land on that date.

2.143 The definition provided in the *Statute* covers all cases of possession.²⁸⁹ Adverse possession may be found in non-payment of the rent by a person in possession of land subject to a rent-charge (adverse possession of the rent-charge), or receipt of rent under a lease by a person wrongfully claiming the reversion of land (adverse possession of the land).²⁹⁰ This represents a change in the law as it was prior to the coming into force of the State. Where the land ceases to be in adverse possession after the right of action has accrued and before the right of action is statute-barred, the right of action is no longer deemed to have accrued.²⁹¹ Acknowledgements have a significant effect

²⁸⁶ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1139. Sections 14-17 consolidate statutory provisions existing prior to the enactment of the *Statute of Limitations 1957*.

²⁸⁷ Section 18(1), *Statute of Limitations 1957*. Sections 18(1), (2) and (3) put existing rules of law into statutory form, while section 18(4) alters the law as it stood prior to the commencement of the *Statute* in 1959.

²⁸⁸ Section 18(2), *Statute of Limitations 1957*.

²⁸⁹ Oireachtas Debates, Dáil Eireann, volume 154, 1 March 1956, *Statute of Limitations Bill 1954 – Second Stage* at 1139-1140.

²⁹⁰ Section 18(4), *Statute of Limitations 1957*.

²⁹¹ Section 18(3), *Statute of Limitations 1957*.

on the rights of the person who is in adverse possession of land: if someone in adverse possession indicates that they recognise that the dispossessed person is the lawful owner of the land, this is inconsistent with their own adverse title to the land. This acknowledgement destroys their possessory title up to that point, and time begins to run afresh in their favour.²⁹² Part payment of a debt secured on land may start time running again.²⁹³ Thus, it may be said that very little action on the part of a land-owner is required in order to stop time running.²⁹⁴

2.144 It is noteworthy that in proceedings before the Grand Chamber of the European Court of Human Rights in *Pye (Oxford) Ltd v United Kingdom*, the Irish Government, who intervened to make submissions in the case, identified the following five areas of public interest that are served by the doctrine of adverse possession:

- i) In quieting titles, that is, the desirability of clarifying title where land, whether registered or unregistered, had remained abandoned and was occupied by another person;
- ii) In cases of failure to administer estates on intestacy;
- iii) In pursuance of a policy of using land to advance economic development;
- iv) In perfecting title in cases of unregistered title, and
- v) In dealing with boundary disputes.²⁹⁵

2.145 The Commission has previously expressed the view that the doctrine of adverse possession to be “one of the most controversial features of modern land law.”²⁹⁶ The Commission is engaged in a separate project on adverse possession²⁹⁷ and will deal with this area in more detail in that context.

²⁹² Section 51, *Statute of Limitations 1957*.

²⁹³ See sections 61-70, *Statute of Limitations 1957*.

²⁹⁴ *J.A. Pye (Oxford) Ltd v United Kingdom*, App no. 44302/02, judgment of 30 August 2007 at § 78.

²⁹⁵ See *ibid* at §§ 50-51.

²⁹⁶ Law Reform Commission *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) at 26-27.

²⁹⁷ *Third Programme of Law Reform 2008-2014*, Project 20.

(5) Actions in respect of Breach of Trust

2.146 In the event of a breach of trust, beneficiaries may seek to bring an action against trustees.²⁹⁸ Section 2(2) of the *Statute of Limitations 1957*, as amended, relates to the interpretation of the term “trustee.”²⁹⁹ Both express and constructive trustees are brought within the terms of the *Statute*. Personal representatives of deceased personal are not, in that capacity, “trustees” for the purpose of the *Statute*.³⁰⁰

2.147 The limitation of actions to recover money or other property in respect of a breach of trust is regulated by section 43 of the *Statute*, provided that no other period of limitation is fixed elsewhere for that action. Such actions must be brought against a trustee (or another person claiming through the trustee) within six years from the date of accrual.³⁰¹ The action accrues to a beneficiary entitled to a future interest in trust property only when the interest falls into the beneficiary’s possession.³⁰²

2.148 No beneficiary against whom there would be a good defence under section 43 may derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if the beneficiary had brought the action and the *Statute* had been pleaded in his or her defence.³⁰³ No limitation period applies to an action against a trustee (or a person claiming through a trustee) in the following situations:

- (a) Where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or

²⁹⁸ The principal legislation in this area is the *Trustee Act 1893*, as amended. The Commission has recommended that the 1893 Act be replaced by a modern legislative code: see Law Reform Commission *Report on Trust Law: General Proposals* (LRC 92 - 2008), which includes a draft *Trustee Bill*.

²⁹⁹ Section 2(2)(c) was repealed by section 5 of the *Registration of Title Act 1964*. Section 2(2)(d) was amended by section 26 the *Administration of Estates Act 1959*, and again by section 122 of the *Registration of Title Act 1964*.

³⁰⁰ Section 123(1), *Succession Act 1965*, which replaces section 2(2)(d) of the *Statute of Limitations 1957*. See further Sperin *The Succession Act 1965 - A Commentary* (3rd ed 2003) at §791-794.

³⁰¹ Section 43(1)(a), *Statute of Limitations 1957*.

³⁰² Section 43(1)(b), *Statute of Limitations 1957*.

³⁰³ Section 43(2), *Statute of Limitations 1957*.

(b) Where the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use.³⁰⁴

2.149 This continues the rule of perpetual liability, which was applicable in equity to express trusts.³⁰⁵

2.150 Part 4 (sections 18 to 22) of the *Land and Conveyancing Law Reform Act 2009*, which implemented the views of the Commission in this area,³⁰⁶ greatly simplifies the law concerning the various ways in which settlements of land can be created. As a result, the *Settled Land Acts 1882 to 1890* are to be repealed in full by the 2009 Act,³⁰⁷ and some consequential changes concerning the 1882 to 1890 Acts are likely to follow.³⁰⁸

(6) Succession Actions

2.151 Part XI of the *Succession Act 1965* made various changes to the law governing the limitation of actions in respect of the estates of deceased persons.³⁰⁹ The limitation periods currently applicable to these succession actions are generally shorter than the limitation periods applicable to living plaintiffs and defendants. The courts have noted that there are reasons why the administration of estates should not be delayed beyond a reasonable time.³¹⁰ For example, as noted by the Supreme Court:-

“Bearing in mind the State's duty to others—in particular those who represent the estate of the deceased, and beneficiaries—some

³⁰⁴ Section 44, *Statute of Limitations 1957*.

³⁰⁵ Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 162.

³⁰⁶ See Law Reform Commission *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) at 68-91.

³⁰⁷ At the time of writing (July 2009), no Commencement Order has yet been made for the 2009 Act.

³⁰⁸ The Commission will examine these consequential issues under its *Third Programme of Law Reform 2008-2014*, Project 21.

³⁰⁹ The Act came into force on January 1, 1967: see the *Succession Act 1965 (Commencement) Order 1966* (SI No.168 of 1966). Section 8 and the Second Schedule of the 1965 Act repealed sections 2(2)(d), 22, 45 and 46 and the word “co-parceners” in section 21 of the *Statute of Limitations 1957*.

³¹⁰ *MDP and others v MD* [1981] ILRM 179.

reasonable limitation on actions against the estate was obviously required.”³¹¹

(a) Actions by the Testator’s Children

2.152 A testator’s children are not entitled to a fixed percentage of their parent’s estate. Nevertheless, parents have a “moral duty” to make proper provision for the child in accordance with their means, whether by will or otherwise.³¹² A testator’s child may apply to the courts under section 117 of the *Succession Act 1965* seeking an order that provision be made for them out of the estate. Such an order may be made only if the court is of the opinion that the testator has failed in this moral duty.³¹³

2.153 Initially, the *Succession Act* set a 12-month limitation period for the bringing of a section 117 application, running from the date on which representation is taken out on the estate.³¹⁴ This has since been reduced to six months,³¹⁵ drafted so as to prevent the courts from making an order under section 117 if proceedings are issued out of time, even if the defendant does not specifically rely on the limitation defence. Indeed, it appears that both the right and the remedy are barred after the expiry of the limitation period.³¹⁶

(i) Previous Recommendations

2.154 Almost two decades ago, following the decision in *MPD & Ors v MD*³¹⁷ and before the reduction of the limitation period from twelve to six months, the Commission made proposals for the reform of the limitation period applicable to section 117, and expressed the view that there is a distinct possibility that section 117(6) would not withstand a constitutional challenge. The Commission further observed as follows:-

“Since the right of a child to apply under s.117 is undoubtedly a property right, it is difficult to see how the imposition of a one year time

³¹¹ *Moynihan v Greensmyth* [1977] IR 55, 72 (SC).

³¹² Section 117(1), *Succession Act 1965*. See also section 117(1A), inserted by section 31 of the *Status of Children Act 1987*.

³¹³ Section 117(1), *Succession Act 1965*.

³¹⁴ Section 117(6), *Succession Act 1965*, as enacted,

³¹⁵ Amended by section 46 of the *Family Law (Divorce) Act 1996*. This reduction was in line with the six-month limitation period for applications by a former spouse under section 18 of the 1996 Act.

³¹⁶ [1981] ILRM 179.

³¹⁷ *MDP and others v MD* [1981] ILRM 179.

limit in the case of an infant child can be other than an unjust attack on that right.”³¹⁸

2.155 The Commission acknowledged that the strict (then 12-month) time limit seeks to secure the desirable aim of ensuring speedy distribution of estates but noted that this aim has been given priority over the at least equally laudable object of ensuring that parents cannot opt to fail to provide properly for their children in their wills. We considered that the need to enable estates to be distributed without unreasonable delay has been given too great a priority in this situation.³¹⁹

2.156 The Commission compared the section 117 limitation period to the unfettered discretion accorded to the English courts in an analogous situation. While a six-month limitation period runs from the date on which representation is first taken out, the English courts may give permission for an application for provision to be made after that limitation period has expired.³²⁰

2.157 The Commission rejected the introduction a longer, fixed limitation period and recommended that the courts should be given discretion to extend the (then 12-month) limitation period under section 117(6). The vast majority of submissions received on the subject favoured this option. The Commission considered that this discretion should be confined to “the limited number of cases which give rise to concern, that is, for example, not just because a child did not consult solicitors in time or was unaware of the time limit.” The Commission rejected the possibility of the discretion being exercisable only where the child was under a disability at the time of death.³²¹

2.158 The Commission’s recommendations have not yet been implemented. Instead, as noted above, the legislature has opted to reduce the limitation period even further. This increases the urgency of the Commission’s

³¹⁸ Law Reform Commission *Report on Land Law and Conveyancing Law: General Proposals* (LRC-30, 1989) at paragraph 45. The Commission cited the Supreme Court’s decision in *O’Brien v Keogh* [1972] IR 144.

³¹⁹ Law Reform Commission *Report on Land Law and Conveyancing Law: General Proposals* (LRC-30, 1989), at paragraphs 45-46.

³²⁰ Section 4, *Inheritance (Provision for Family and Dependants) Act 1975* (c. 63). See also *ibid* at section 20, which prevents personal representatives from liability for having distributed the estate before an order under section 2 of the Act was made.

³²¹ Law Reform Commission *Report on Land Law and Conveyancing Law: General Proposals* (LRC-30, 1989) at paragraph 47. The Commission also recommended that the section 117 application be extended to intestacies.

observations and recommendations. Section 117 protects children against neglect and disinheritance, and ensures that dependants are provided for and that the State is not burdened with the cost of supporting them.³²² The Supreme Court has described this section as “a most important part” of family law.³²³

(ii) Duty to Inform the Children of the s.117 Procedure

2.159 Neither the personal representative nor the beneficiaries’ solicitor has a duty to inform the testator’s children when the grant issues.³²⁴ The children may, therefore, be totally unaware of their right to make an application under section 117. Moreover, an infant child in the care of a beneficiary under the will is in a very precarious position because any pecuniary advantage accrued by the child may reduce the guardian’s own gift under the will.³²⁵

2.160 It might, however, be unwise for a personal representative to notify children of their right to make an application under s. 117. It has been argued that the personal representative would be imprudent (particularly if he was a professional executor) to give such notice, as this “would to some extent frustrate the directions contained in a will, and would prejudice beneficiaries thereunder to whom the executor would be accountable.”³²⁶

2.161 The Commission previously rejected a submission that the personal representative should have a duty to inform the children (or their parents or guardians) of their right to apply under section 117, considering that such an obligation would impose an unfair burden on personal representatives in that it could require them to make enquiries of the known next-of-kin as to the possible existence of others.³²⁷ This approach was also taken by the High Court in *Rojack v Taylor & Buchalter*.³²⁸

³²² Wills “Section 117 - Out of Step with the Times: A Critique of Section 117 of the Succession Act 1965 and Comparison with the Inheritance (Provision for Family and Dependents) Act 1975 (UK)” (2001) 6(4) CPLJ 84.

³²³ *O’B v S* [1984] IR 316, 335 (SC).

³²⁴ *Rojack v Taylor and Buchalter* [2005] 1 IR 416, 426 (Quirke J).

³²⁵ Storan “Section 117 of the Succession Act 1965: Another Means for the Courts to Rewrite a Will?” (2006) 11(4) CPLJ 82.

³²⁶ Sperin *The Succession Act 1965 and Related Legislation, A Commentary* (3rd ed 2003) at 353, quoted with approval by Quirke J. in *Rojack v Taylor and Buchalter* [2005] 1 IR 416, 426.

³²⁷ Law Reform Commission *Report on Land Law and Conveyancing Law: General Proposals* (LRC-30, 1989) at paragraph 47.

³²⁸ *Rojack v Taylor and Buchalter* [2005] 1 IR 416, 426 .

2.162 Two remedies are available for this problem: the children, their parents or guardians could seek an undertaking from the solicitor to notify them when the grant issues or they could conduct periodic searches in the Probate Office or District Probate Registry.³²⁹

(iii) Postponement of the Six-Month Limitation Period

2.163 The disability and infancy provisions of the *Statute* generally postpone the running of the limitation period for actions in respect of a claim to the estate of a deceased person or to any share in such estate³³⁰ but these safeguards do *not* apply to section 117 applications.³³¹ As a result, infants or persons under a disability are unable to make a section 117 application after six months from the raising of representation. This creates a potential injustice, as the infant or disabled person's next friend – usually a parent or guardian – may well have a conflicting interest. If the disability provisions were to apply, the period of limitation would be extended to six months after the disability or infancy ended. The estate would therefore be open to claims on behalf of the deceased's children until six months after the deceased's children's infancy and/or disabilities ended.³³²

2.164 In *MPD v MD*, Carroll J. accepted that there are “compelling reasons” why the disability provisions should mitigate the short section 117 limitation period, but she also noted that there are good reasons why the administration of an estate should not be delayed.³³³ Other commentators have suggested that the lack of mitigation of the short limitation period may have been an oversight.³³⁴

2.165 The Supreme Court has stated that the application of disability provisions “could mean that the administration of an estate might be greatly delayed or, alternatively, that after many years those entitled on a death might be subjected to a claim for damages of which there had been no prior notice. Obviously in such circumstances severe hardship might be caused and injustice

³²⁹ Hourican “Section 117 Claims: Practice and Procedure and Matters to Bear in Mind” (2001) 6(3) CPLJ 62.

³³⁰ See section 127, *Succession Act 1965*.

³³¹ *MPD and others v MD* [1981] ILRM 179.

³³² *MPD and others v MD* [1981] ILRM 179.

³³³ *MPD and others v MD* [1981] ILRM 179, citing the Supreme Court decision in *Moynihan v Greensmyth* [1977] IR 55, 72.

³³⁴ See Brady & Kerr *Limitation of Actions in Ireland*

done to innocent people.”³³⁵ The Court added that “the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of the estate of a deceased.”³³⁶

2.166 In its 1989 *Report on Land Law and Conveyancing Law*, the Commission rejected submissions that an application could be taken during a period ending a year after the expiry of a disability.³³⁷

(b) Actions by the Testator’s Spouse

2.167 According to the current law of succession, if a testator dies leaving a spouse and no children, the spouse is legally entitled to one half of the estate, irrespective of the contents of any will.³³⁸ If a testator dies leaving a spouse and children, the spouse has a legal right to one third of the estate, irrespective of the contents of any will.³³⁹ Actions in respect of the legal right share are subject to a six-year limitation period.³⁴⁰ The accrual of the limitation period depends on the time at which the spouse makes his or her ‘election’ in respect of the legal right share or a benefit left in the will.³⁴¹ This election must be made within six months of written notification being received by the spouse from the personal representative of the right to elect, or within one year of the first taking out of representation to the estate, whichever is later.³⁴²

2.168 The limitation period runs from the date on which the spouse makes an election or the spouse has been notified of the right to make an election and the time within which an election may be made has elapsed. It is only at this point that the right to receive the legal right share accrues.³⁴³ Where the

³³⁵ *Moynihan v Greensmyth* [1977] IR 55, 72. This case concerned the constitutionality of section 9(2)(b) of the *Civil Liability Act 1961*, which sets a two-year limitation period for actions surviving against the estate of a deceased person, to which the disability .

³³⁶ *Moynihan v Greensmyth* [1977] IR 55, 72.

³³⁷ Law Reform Commission *Report on Land Law and Conveyancing Law: General Proposals* (LRC-30, 1989) at paragraph 47.

³³⁸ Section 111(1), *Succession Act 1965*.

³³⁹ Section 111(2), *Succession Act 1965*. This entitlement is known as the ‘legal right share’.

³⁴⁰ Section 45, *Statute of Limitations 1957*, repealed and replaced by section 126, *Succession Act 1965*.

³⁴¹ Section 115(4), *Succession Act 1965*.

³⁴² Section 115(4), *Succession Act 1965*.

³⁴³ See *JH v WJH* (Keane J) 20 December 1979.

testator's will includes no legacy or devise in favour of the spouse, however, or includes a legacy or devise stated to be in addition to the legal right share, the spouse has no right of election and the legal right share is deemed to vest automatically in the spouse on the testator's death.³⁴⁴

(c) Actions by the Testator's Divorcé(e)

2.169 Once a couple is granted a decree of divorce, the marriage is dissolved and the *Succession Act* ceases to function in their regard as a married couple.³⁴⁵ A divorce does not, however, necessarily represent a clean break from inheritance rights. Under section 18 of the *Family Law (Divorce) Act 1996* the courts may order provision for a divorced spouse out of the estate of their deceased former spouse, having regard to the rights of any other person having an interest in the matter, if it is satisfied that proper provision in the circumstances was not made for the deceased's surviving former spouse during the lifetime of the deceased.³⁴⁶ Applications under section 18 must be made no longer than six months after representation is first granted in respect of the estate of the deceased person.³⁴⁷ This right also extends to a spouse whose spousal inheritance rights are extinguished following a judicial separation, pursuant to section 15A of the *Family Law Act 1995*.³⁴⁸ No application can be made in either case, however, after the re-marriage of the applicant spouse.³⁴⁹

2.170 The personal representative of the deceased spouse has a statutory obligation to "make a reasonable attempt" to bring his or her death to the

³⁴⁴ *O'Dwyer v Keegan* [1997] 1 ILRM 102.

³⁴⁵ Section 10(1) of the *Family Law (Divorce) Act 1996* provides that the marriage is "dissolved" on foot of a decree of divorce.

³⁴⁶ See section 18(1), *Family Law (Divorce) Act 1996*. The court must be satisfied that proper provision "in the circumstances" was not made for the applicant (divorced) spouse during the lifetime of the deceased (divorced) spouse, and to all the circumstances of the case. See *ibid* at sections 18(3) and (4).

³⁴⁷ Section 18(1), *Family Law (Divorce) Act 1996*.

³⁴⁸ Section 15A, *Family Law Act 1995*, inserted by section 52(g) of the *Family Law (Divorce) Act 1996*. Under section 14 of the *Family Law Act 1995*, a court may, when or after granting a decree of judicial separation, make an order extinguishing the share to which either of the spouses would otherwise be entitled in the estate of the other spouse as a legal right or on intestacy under the *Succession Act 1965*.

³⁴⁹ Section 18(2), *Family Law (Divorce) Act 1996*. No application can be made, either, by spouses whose rights are extinguished under the *Judicial Separation and Family Law Reform Act 1989*.

attention of the divorced spouse.³⁵⁰ The applicant (divorced) spouse has a statutory obligation to notify the personal representative within one month of receipt of notice, of his or her intention to make a section 18 application.³⁵¹ This may be contrasted to the situation in which the children of a deceased person find themselves, under section 117 of the *Succession Act*.

(d) Actions to recover a Share in Land comprised in the Estate

2.171 Section 125 of the *Succession Act 1965* regulates the acquisition of title to land of two or more of the next of kin or others who are entitled to land under a will or the intestacy of the owner of the land.³⁵² This section applies where two or more people are entitled to an (equal or unequal) share in land comprised in the estate of a deceased person.

2.172 Where any or all of the beneficiaries enter into possession of the land, they are deemed to have acquired title by possession as joint tenants (not as tenants in common) with respect to their own shares and with respect to the shares of those who do not enter into possession of the land (if any).³⁵³ In *Maher v Maher*, O'Hanlon J. held that this section enacted the common law as it existed at passing of the *Succession Act*.³⁵⁴ This view boosted by the Supreme Court's decision in *Gleeson v Feehan (No. 2)*.³⁵⁵

(e) Actions by Personal Representatives

2.173 At common law, the personal representatives of a deceased person could not sue or be sued for any tort committed against or by the deceased.³⁵⁶

³⁵⁰ Section 18(6), *Family Law (Divorce) Act 1996*.

³⁵¹ Section 18(7), *Family Law (Divorce) Act 1996*.

³⁵² Section 125, *Succession Act 1965*.

³⁵³ Section 125(1), *Succession Act 1965*. For the purpose of the *Statute of Limitations 1957*, this rule applies whether or not the person was entering into possession as a personal representative of the deceased person, or having entered, was subsequently granted representation to the estate of the deceased person. See *ibid* at section 125(2).

³⁵⁴ [1987] ILRM 582. But see *Ruddy v Gannon* [1965] IR 283.

³⁵⁵ [1997] ILRM 522. See in particular the judgment of Keane J. at 535. See also Sperin *The Succession Act 1965 - A Commentary* (3rd ed 2003) at §§798-804.

³⁵⁶ '*Actio personalis moritur cum persona*'. See further *Moynihan v Greensmyth* [1977] IR 55, 67-8 (SC). A remedy could be pursued against the estate of the deceased only where the deceased had appropriate property or the proceeds or value of property belonging to another, and added it to his own estate.

This remained the case until the early 20th century.³⁵⁷ Now, most causes of action vested in the deceased person on his death will survive for the benefit of or against the deceased's estate³⁵⁸ and the personal representative may sue or be sued on behalf of the estate for such actions.³⁵⁹

2.174 The limitation of actions taken by a personal representative in respect of property (whether realty or personalty) that is alleged to form part of the deceased person's estate is governed by the general limitation periods set out in *Statute of Limitations 1957*.³⁶⁰ Thus, for example, the time-limit for a personal representative to bring an action to recover property belonging to the estate is twelve years from the date on which the cause of action first accrued.³⁶¹ The date of accrual is the date of death of the deceased person.³⁶²

(f) Actions to Recover Arrears

2.175 Actions to recover arrears of interest in respect of a legacy or damages in respect of such arrears must be brought within three years from the date on which the interest became due.³⁶³ As enacted, the *Statute of Limitations* set a six-year limitation period for such actions, but this was reduced by the *Succession Act 1965*.³⁶⁴

(7) Actions by Beneficiaries

2.176 Beneficiaries who are seeking to establish a share or interest in the estate of a deceased person must initiate their action within six years of the deceased person's date of death.³⁶⁵ This applies irrespective of whether the share or interest is claimed under a will, on intestacy, or as a legal right share under section 111 of the *Succession Act 1965*. This limitation period was

³⁵⁷ See e.g. section 171, *Road Traffic Act 1933*; section 6, *Fatal Injuries Act 1956*; section 117, *Road Traffic Act 1961*; section 7(1), *Civil Liability Act 1961*.

³⁵⁸ Section 7(1), *Civil Liability Act 1961*.

³⁵⁹ Section 48, *Civil Liability Act 1961*.

³⁶⁰ *Drohan v Drohan* [1984] ILRM 179; *Gleeson v Feehan and Purcell (No. 2)* [1997] ILRM 522 (SC).

³⁶¹ Section 13(2), *Statute of Limitations 1957*.

³⁶² *Gleeson v Feehan and Purcell (No. 2)* [1997] ILRM 522 (SC).

³⁶³ Section 45(2), *Statute of Limitations 1957*, as amended by section 126(2), *Succession Act 1965*.

³⁶⁴ See section 126(2), *Succession Act 1965*.

³⁶⁵ Section 45, *Statute of Limitations 1957*, as amended by section 126, *Succession Act 1965*.

initially 12 years in length, but was reduced by the *Succession Act 1965*.³⁶⁶ This limitation period applies to actions in respect of realty and personalty,³⁶⁷ and is subject to postponement in cases of fraud.³⁶⁸ It applies to actions by beneficiaries against personal representatives or against those who were wrongfully paid or who wrongfully received that to which the beneficiary is entitled.³⁶⁹ It does *not* apply to actions by personal representatives on behalf of the estate.³⁷⁰

(I) *Accrual*

2.177 The six year limitation period applicable to actions by beneficiaries runs from “the date when the right to receive the share or interest accrued”.³⁷¹ It is not immediately clear at what stage the right to receive a share or interest accrues.³⁷² Where there is a will, and an executor is appointed, time runs from the date of death, because proceedings may be commenced against an executor from the date of death.³⁷³ In the case of intestacy, or a testacy where there is no executor, time runs from the date of death even if representation has not been raised.³⁷⁴

³⁶⁶ Section 126, *Succession Act 1965*.

³⁶⁷ As enacted, section 45 of the *Statute of Limitations 1957* referred only to the “personal estate” of the deceased. The word “personal” was removed by section 126, *Succession Act 1965* and section 3 of the 1965 Act defines property to include both land (“real property”) and other property such as goods (“personal property.”)

³⁶⁸ Section 45 of the *Statute of Limitations 1957*, as amended, is expressly subject to section 71, which provides for the postponement of the limitation period in cases of fraud.

³⁶⁹ *Gleeson v Feehan and Purcell* [1993] 2 IR 113 (Egan J).

³⁷⁰ *Drohan v Drohan* [1984] IR 311; *Gleeson v Feehan and Purcell* [1993] 2 IR 113.

³⁷¹ Section 45(1), *Statute of Limitations 1957*, as amended by section 126, *Succession Act 1965*.

³⁷² Keating “Time Limits for a Beneficiary or a Personal Representative to Commence Proceedings” (2004) 9(1) CPLJ 2.

³⁷³ *Gleeson v Feehan (No. 1)* [1991] ILRM 783. The executor’s authority arises under the will and not pursuant to the grant of probate. The grant is merely confirmation of the executor’s authority.

³⁷⁴ *Gleeson v Feehan (No. 2)* [1997] ILRM 522. Pending the grant of representation, the estate vests in the President of the High Court and time can run against the

2.178 There are two possible interpretations of the date of accrual for a beneficiary's action against a personal representative. The first option is that the action accrues on the date of death because the issuing of the grant dates back to this date, even though no action can be commenced by the beneficiaries during the "executor's year" without leave of the court.³⁷⁵ If this option is correct, the beneficiaries have six years from the date of death, and five years from the date of expiry of the "executor's year". The second option is that the action accrues at the date of expiry of the "executor's year", and the six-year limitation period begins to run at that point.³⁷⁶

(II) *Actions by Beneficiaries against Personal Representatives*

2.179 The personal representative of a deceased person has an obligation to distribute the estate as soon after the date of death as is reasonably practicable.³⁷⁷ In addition, he or she owes a duty of diligence to creditors and beneficiaries when administering and distributing the estate.³⁷⁸ Beneficiaries may take an action against personal representatives in respect of a failure to administer and distribute an estate. A shorter period of time applies to such actions, however, than that which applies to actions by personal representatives on behalf of the estate.³⁷⁹ Actions by beneficiaries against personal representatives cannot be commenced until the expiry of one year from the date of death.³⁸⁰ Proceedings may only be commenced within this period with leave of the court.³⁸¹ This twelve-month period is traditionally known as "the

President for the purpose of the Statute. See *Flack v President of the High Court*, High Court, 29 November 1983.

³⁷⁵ This is the position under section 14(2) of the *Statute of Limitations 1957*, which applies to actions to recover the land of the deceased.

³⁷⁶ See further Keating "Time Limits for a Beneficiary or a Personal Representative to Commence Proceedings" (2004) 9(1) CPLJ 2.

³⁷⁷ Section 62(1), *Succession Act 1965*. Regard is to be had to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances. *Ibid.*

³⁷⁸ *Re Tankard* [1942] Ch 69.

³⁷⁹ Sections 62 and 126, *Succession Act 1965*. These sections replaced sections 45 and 46 of the *Statute of Limitations 1957*, which were repealed by section 8 and Schedule 2 of the *Succession Act 1965*.

³⁸⁰ Section 62(1), *Succession Act 1965*.

³⁸¹ Section 62(1), *Succession Act 1965*.

executor's year".³⁸² In reality, the personal representative may not have a year at all, depending on the date of the grant of probate.

2.180 Creditors of a deceased person may bring proceedings against the personal representative before the expiration of one year from the date of death.³⁸³

2.181 As enacted, the *Statute* provided that no limitation period applied to an action against a personal representative where the claim was founded on any fraud to which the personal representative was party or privy.³⁸⁴ This provision was repealed,³⁸⁵ but the limitation period for actions against personal representatives is still subject to the provisions of the *Statute* that govern the postponement of the running of the limitation period in cases of fraud or concealment.³⁸⁶

(III) *Problems with the Current Law*

2.182 There appears to be a lack of consistency in the law governing the limitation of actions by beneficiaries and actions by personal representatives: a much shorter time-limit applies to the former when compared with the latter. After six years have expired after the date of accrual, the beneficiary's claim is statute-barred. Nevertheless, the personal representative's action to recover the deceased person's property is not yet statute-barred for a further number of years. Thus, the personal representative may be able to recover property without being compellable to account for it to the beneficiaries.³⁸⁷ This is problematic, particularly given that personal representatives will often also be beneficiaries. This "dual-capacity" may create confusion, particularly where the limitation period has run out for other beneficiaries to bring a claim against the personal representative.³⁸⁸ There is, therefore, a difficulty with the law in this respect.³⁸⁹

³⁸² Keating "Time Limits for a Beneficiary or a Personal Representative to Commence Proceedings" (2004) 9(1) CPLJ 2.

³⁸³ Section 62(2), *Succession Act 1965*.

³⁸⁴ Section 46, *Statute of Limitations 1957*.

³⁸⁵ Section 8 and Second Schedule, *Succession Act 1965*.

³⁸⁶ See section 71, *Statute of Limitations 1957*.

³⁸⁷ See Sperin *The Succession Act 1965 - A Commentary* (3rd ed 2003) at § 811.

³⁸⁸ Keating "Time Limits for a Beneficiary or a Personal Representative to Commence Proceedings" (2004) 9(1) CPLJ 2.

³⁸⁹ See Hourican "The Running of Time in Succession Law: Gleeson v Feehan and Purcell" (2000) 5(2) CPLJ 34.

2.183 A personal representative is not prevented from acquiring a concurrent interest in land for the purpose of the limitation of actions.³⁹⁰ It is possible that a personal representative might be in adverse possession of land belonging to the estate of the deceased. After twelve years, there is nothing to stop the personal representative from seeking to obtain title by adverse possession.³⁹¹ The current six-year limitation period does not allow beneficiaries to prevent the personal representative from acting in this way. Beneficiaries may remedy this situation by seeking acknowledgement of their interest in the land before the expiry of the initial six-year period; such acknowledgment gives rise to a fresh accrual of their right of action against the personal representative. Alternatively, the beneficiaries may attempt to prove fraud or concealment on the part of the personal representative; this would postpone the running of the limitation period, but may be difficult to prove.³⁹²

(IV) *Previous Recommendations*

2.184 The Commission published recommendations in 2003 with respect to claims involving a deceased's estate,³⁹³ wherein it recommended that the time limit for bringing actions in respect of any claim to the estate of a deceased person or in respect of any share or interest in the estate should begin to run from the date of death. This recommendation was influenced by the fact that the date of death is fixed, easily ascertainable, and is not dependent on a range of contingencies.³⁹⁴

2.185 The Commission also recommended that the six-year limitation period applicable to actions by beneficiaries should be extended to 12 years. This limitation period would be the same as that applicable to actions by personal representatives, which would lead to greater simplicity. It would also create consistency as it would align the limitation of actions to recover land forming part of the estate of a deceased person with the general law on adverse possession.³⁹⁵

³⁹⁰ Section 125, *Succession Act 1965*.

³⁹¹ Law Reform Commission *Report on Land Law and Conveyancing: (7) Positive Covenants over Freehold Land and other proposals* (LRC 70-2003, March 2003) at paragraphs 6.31-6.38

³⁹² *Ibid* at paragraphs 6.39-6.40.

³⁹³ *Ibid* at 56-75.

³⁹⁴ *Ibid* at paragraphs 6.25-6.26.

³⁹⁵ This would return the limitation regime to a pre-*Succession Act* position. Law Reform Commission *Report on Land Law and Conveyancing: (7) Positive*

2.186 The Commission rejected the option of reducing the limitation period for all actions for the recovery of property forming part of the estate of a deceased person to six years. It was thought that this would confer an unfair advantage on a squatter, who could obtain title by adverse possession in half the normal time simply because the owner of the land was deceased.³⁹⁶

2.187 Certain commentators have agreed with the Commission's proposals.³⁹⁷ It has been suggested, however, that a policy of reducing the time limit would be more in keeping with the general policy against delay in the administration of estates. Thus, it has been argued that instead of increasing the limitation period for actions by beneficiaries to twelve years, the limitation period for actions by personal representatives should be reduced to six years.³⁹⁸ This proposal was based on the following experience:

"[...] beneficiaries are not coy when it comes to claiming shares or interests in estates, and any tardiness by executors or by persons entitled to apply for grants under the Rules of the Superior Courts may be remedied by the existent citation process or by action against the personal representatives for breach of duty to administer the estate; beneficiaries are rarely undone by sloth."³⁹⁹

(8) Survival of Actions

2.188 Most causes of action vested in the deceased person on his death will survive for the benefit of the deceased's estate. The *Statute of Limitations 1957* and the *Civil Liability Act 1961* set the limitation periods for actions that survive death. Not all claims survive for the benefit of, or against the estate. The following 'excepted actions' set out in the *Civil Liability Act 1961* - most of which have been abolished - do not survive death.⁴⁰⁰

Covenants over Freehold Land and other proposals (LRC 70-2003) at paragraph 6.43-6.45.

³⁹⁶ Law Reform Commission *Report on Land Law and Conveyancing: (7) Positive Covenants over Freehold Land and other proposals* (LRC 70-2003) at paragraph 6.42.

³⁹⁷ See Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 151: "We see no good reason why a squatter should benefit from a reduction in the limitation period because of the death of the owner."

³⁹⁸ Keating "Time Limits for a Beneficiary or a Personal Representative to Commence Proceedings" (2004) 9(1) CPLJ 2.

³⁹⁹ *Ibid.*

⁴⁰⁰ Section 6, *Civil Liability Act 1961*.

- (1) Breach of promise to marry (now repealed);⁴⁰¹
- (2) Inducing one spouse to leave or remain apart from the other spouse (now repealed);⁴⁰²
- (3) Criminal conversation (now repealed);⁴⁰³
- (4) Claims for compensation under the (now repealed) *Workmen's Compensation Act 1934*;⁴⁰⁴
- (5) Seduction;⁴⁰⁵
- (6) Defamation.⁴⁰⁶

2.189 There follows a discussion of the limitation periods that apply to actions that do survive the death of the potential plaintiff / defendant.

⁴⁰¹ Repealed by section 2(1), *Family Law Act 1981*. See Law Reform Commission *The Law Relating to Breach of Promise of Marriage* (Working Paper No. 4-1978); Law Reform Commission *First Report on Family Law* (LRC 1-1980).

⁴⁰² Repealed by section 1(1), *Family Law Act 1981*. See Law Reform Commission *Criminal Conversion and the Enticement and Harboring of a Spouse* (Working Paper No. 5, 1978); Law Reform Commission *First Report on Family Law* (LRC 1-1980).

⁴⁰³ Repealed by section 1(1), *Family Law Act 1981*. See Law Reform Commission *Criminal Conversion and the Enticement and Harboring of a Spouse* (Working Paper No. 5, 1978); Law Reform Commission *First Report on Family Law* (LRC 1-1980).

⁴⁰⁴ Repealed by section 40, *Social Welfare (Occupational Injuries) Act 1966*, which first introduced Occupational Injuries Benefit in place of Workmen's Compensation. The relevant provisions are now contained in the *Social Welfare Consolidation Act 2005*.

⁴⁰⁵ The Commission recommended the abolition of this action in its *Working Paper on the Law Relating to Seduction and the Enticement and Harboring of a Child* (WP 6 -1979); and in its *First Report on Family Law* (LRC 1-1980). See further McMahon and Binchy *Law of Torts* (3rd ed 2000) at §§ 33.24-33.26, questioning the constitutionality of the tort.

⁴⁰⁶ This was abolished by section 39 of the *Defamation Act 2009* which amends sections 6, 7 and 8 of the *Civil Liability Act 1961*. A cause of action in defamation now survives the death of the person in respect of whom a defamatory statement was made and it also survives the death of the defamer. This follows the recommendations of the Commission's *Report on the Civil Law of Defamation* (LRC-38, 1991) at paragraphs 13.3-13.7.

(a) Personal Injuries Actions Surviving Death

2.190 Where a person dies as a result of tortuously inflicted personal injuries⁴⁰⁷ within two years of the injuries being inflicted, an action may be brought for the benefit of the deceased person's estate.⁴⁰⁸ The two year limitation period runs from the later of (a) the date of death or (b) the date of the personal representative's knowledge.⁴⁰⁹ Even where the personal representative gains knowledge of the personal injury before his appointment as the personal representative of the deceased, the date of knowledge is taken to be the date of his appointment,⁴¹⁰ as it is only from this point that he or she is under a duty to take steps in respect of the right of action.

(b) Fatal Injuries Actions

2.191 Fatal injuries actions arise where the death of a person is caused by the wrongful action of another, and the deceased person would have been entitled to maintain an action and recover damages, but for his death.⁴¹¹ In such circumstances, a fatal injuries action may be commenced seeking damages for the benefit of the dependants of the deceased person.⁴¹² The limitation period in respect of such actions is two years, running from (a) the date of death or (b) the date of knowledge of the person for whose benefit the action is brought, whichever is later.⁴¹³ Until 2004, this limitation period ran for

⁴⁰⁷ As defined in section 3, *Statute of Limitations (Amendment) Act 1991*.

⁴⁰⁸ See section 4, *Statute of Limitations (Amendment) Act 1991*, amended by section 7, *Civil Liability Act 1961*.

⁴⁰⁹ Section 4(1), *Statute of Limitations (Amendment) Act 1991*, as amended by section 7(b), *Civil Liability and Courts Act 2004*.

⁴¹⁰ Section 4(b), *Statute of Limitations (Amendment) Act 1991*. This follows a recommendation of the Commission: see *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21-1987) at 50.

⁴¹¹ Section 48(1), *Civil Liability Act 1961*. The 1961 Act repealed the *Fatal Injuries Act 1956*.

⁴¹² "Dependants" are defined in section 47, *Civil Liability Act 1961*, as amended by section 1, *Civil Liability (Amendment) Act 1996*.

⁴¹³ Section 6(1), *Statute of Limitations (Amendment) Act 1991*; as amended by section 7(e), *Civil Liability and Courts Act 2004*.

three years.⁴¹⁴ The current, two-year period accords with the limitation period for personal injuries actions.⁴¹⁵

2.192 Only one fatal injuries action may be brought against the defendant.⁴¹⁶ The action may be brought by the personal representative of the deceased person.⁴¹⁷ If the personal representative has not brought an action within six months after the death, or no personal representative has been appointed during that time, an action may be brought by all or any of the dependants.⁴¹⁸

2.193 Where an action for fatal injuries is brought for the benefit of multiple dependants, the limitation period will run separately for each dependant. Thus, the fact that the limitation period applicable to one dependant has expired will not prevent an action being taken for the benefit of another dependant in respect of whom (for example, by reason of disability) the limitation period has not expired.⁴¹⁹

(c) Actions Against the Estate

2.194 Causes of action subsisting against the deceased person on the date of his death will survive against his estate.⁴²⁰ Claims surviving against the deceased person's estate are subject to a two-year limitation period, running from the date of death or the expiry of the "relevant limitation period", whichever expires first.⁴²¹ The "relevant limitation period" is the length of time that has been prescribed by the *Statute of Limitations 1957*, or other limitations legislation.⁴²²

⁴¹⁴ See section 3(6), *Fatal Injuries Act 1956*; section 48(6) of the *Civil Liability Act 1961*; section 6, *Statute of Limitations (Amendment) Act 1991*.

⁴¹⁵ See section 3(1), *Statute of Limitations (Amendment) Act 1991*, amended by section 7(a), *Civil Liability and Courts Act 2004*.

⁴¹⁶ Section 48(2), *Civil Liability Act 1961*.

⁴¹⁷ Section 48(3), *Civil Liability Act 1961*.

⁴¹⁸ Section 48(4), *Civil Liability Act 1961*. The action is for the benefit of all of the dependants, irrespective of whether it is taken by the personal representative or all or any of the dependants.

⁴¹⁹ Section 6, *Statute of Limitations (Amendment) Act 1991*.

⁴²⁰ Section 8(1), *Civil Liability Act 1961*. There are, however, some 'excepted' causes of action, which will not survive against the estate.

⁴²¹ Section 9(2), *Civil Liability Act 1961*.

⁴²² Section 9(1), *Civil Liability Act 1961*.

2.195 This limitation period cannot be postponed in the event of disability or infancy. The constitutionality of this strict rule was upheld by the Supreme Court in *Moynihan v Greensmyth*.⁴²³ In the High Court, Murnaghan J. observed that as a result of his very extensive experience in dealing with cases in which infants were plaintiffs, he could say with reasonable certainty that the number of infants who failed to commence their proceedings on time was “infinitesimal” compared to the number of infant cases commenced on time.⁴²⁴ Murnaghan J. accepted that if the two-year limitation period could be postponed in the event of infancy, in an extreme case this might mean that the winding up of an estate might be held up for over 20 years.⁴²⁵

(9) Claims for Equitable Relief

2.196 Traditionally, statutes of limitation have not applied to equitable claims. Early limitation statutes, such as the English *Limitation Act 1623*, dealt purely with common law claims. With time, however, the courts of equity developed doctrines to deal with the running of time. First, equity applied provisions of the statutes of limitation by analogy. Thus, when an equitable claim was closely analogous to a common law claim, the courts of equity sometimes held themselves bound by the limitation period set down in a limitations enactment in which they were not expressly mentioned. Limitations enactments applicable to common law actions which were adopted as “a rule to assist their discretion”.⁴²⁶

2.197 The limitation periods set by section 11 of the *Statute of Limitations 1957* do not apply to claims for specific performance of a contract or for an injunction or other equitable relief.⁴²⁷ The courts are not, however, prevented from applying section 11 by analogy in the same way as the limitations enactments in force prior to the enactment of the *Statute* were applied.⁴²⁸

2.198 The *Statute* does set some fixed limitation periods for some equitable rights, such as actions by beneficiaries to recover trust property, or in respect of any breach of trust, or actions to recover the estates of deceased persons.⁴²⁹ It

⁴²³ [1977] IR 55.

⁴²⁴ *Moynihan v Greensmyth* [1977] IR 55, 64.

⁴²⁵ *Moynihan v Greensmyth* [1977] IR 55, 64-65.

⁴²⁶ Oireachtas Debates, Dáil Eireann, volume 154, March 01 1956, *Statute of Limitations Bill 1954 – Second Stage* 113.

⁴²⁷ Section 11(9)(a), *Statute of Limitations 1957*.

⁴²⁸ Section 11(9)(b), *Statute of Limitations 1957*.

⁴²⁹ See sections 43, 44 and 45, *Statute of Limitations 1957*.

also sets fixed limitation periods for actions to recover land, and actions by mortgagors to redeem a mortgage.⁴³⁰

2.199 Traditionally, where the application of statutory limitation periods by analogy was not possible, equitable doctrines were used as a statute-bar of sorts. These emanated from the equitable maxim that 'delay defeats equity'. This maxim is enshrined in the phrase *vigilantibus, non dormientibus jura subveniunt* – 'the law assists the vigilant, not those who not sleep'.⁴³¹ Delay is a discretionary factor that may influence a court's decision to grant or withhold equitable relief.⁴³² Two concepts must be examined to understand the application of this equitable maxim in practice: those of *laches* and *acquiescence*. These doctrines were created by equity judges; they are not of statutory origin.

(a) Laches

2.200 The doctrine of *laches* was developed to allow the courts of equity to refuse relief on the ground of unreasonable or prejudicial delay. The doctrine is still applicable to equitable claims that are not governed by a limitations enactment. The effect of this doctrine is that where there has been unreasonable delay in the bringing of the proceedings rendering it unjust to grant relief, a plaintiff's claim may be barred in equity.⁴³³

2.201 It is difficult to identify hard and fast rules as to how the doctrine operates,⁴³⁴ but in general it may be said that delay alone is insufficient - there must also be an injustice or prejudice to the defendant as a result of the delay. In *Murphy v The Attorney General*,⁴³⁵ Henchy J. adopted the definition of laches contained in *Snell's Principles of Equity*,⁴³⁶ namely that the doctrine "essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim."⁴³⁷ Henchy J.

⁴³⁰ See sections 13 and 34, *Statute of Limitations 1957*.

⁴³¹ Brady and Kerr suggest that this maxim "might otherwise serve as a useful description of the *raison d'être* of the *Statute* itself." See *The Limitation of Actions* 2nd ed, 1994) at 167.

⁴³² Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 25.

⁴³³ Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 26.

⁴³⁴ See Brady and Kerr *The Limitation of Actions* (2nd ed, 1994) at 168.

⁴³⁵ *Murphy v Attorney General* [1982] IR 241.

⁴³⁶ (29th ed) at 35. This definition was also accepted in *JH v WJH* (Keane J) 20 December 1979.

⁴³⁷ *Murphy v The Attorney General* [1982] IR 241, 318.

added that “[w]hat is a “substantial lapse of time” must depend on the circumstances of the particular case.”⁴³⁸ Thus, the duration of the equitable limitation period - and the date of its expiry - is measured by judicial discretion. The court will balance the claimant’s justification for delay against the prejudicial consequences caused by the delay to the defendant.

2.202 The primary advantage of the doctrine of *laches* is that it guarantees fairness and ensures that a plaintiff has sufficient knowledge of his or her right of action before denying him a remedial order in respect of that action. Its simplicity and common-sense approach also ensures that litigants understand the system. This means that litigation under the equitable system is straightforward, and rarely produces expensive appeals.⁴³⁹

2.203 The primary disadvantage of *laches* is that the slate is never wiped clean for a defendant.⁴⁴⁰ Potential defendants can never be sure that a claim will not be taken against them, even after decades have elapsed following the occurrence of the act or omission that might give rise to a claim. Indeed, potential defendants may be completely unaware of the possibility of a claim until many years have passed after the event, making it near impossible to successfully mount a defence to a claim then commenced.

(b) Acquiescence

2.204 *Acquiescence* means that where one party infringes another party’s rights and the latter party seeks no legal redress for that infringement, equity infers that the latter party has acquiesced in the former’s actions, and the latter party’s claim may be barred in equity.⁴⁴¹ The plaintiff must either expressly or impliedly represent that he or she does not intend to enforce a claim. As a result of this representation, it becomes unjust to grant the relief which he subsequently seeks.⁴⁴² Acquiescence and *laches* are often coupled and the courts do not always separate them; indeed, acquiescence has been referred to as an “element in *laches* operating by way of estoppel.”⁴⁴³

2.205 For both *laches* and *acquiescence*, the modern approach is to ask whether it would be unconscionable for a party to be permitted to assert his

⁴³⁸ *Ibid* at 318.

⁴³⁹ Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 23.

⁴⁴⁰ *Ibid* at 23.

⁴⁴¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 26.

⁴⁴² Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 29.

⁴⁴³ *McCausland v Young* [1949] NI 49, 89 (Andrews LCJ), cited in Brady & Kerr *The Limitation of Actions* (2nd ed 1994) at 169.

beneficial rights. It is not a matter of requiring a plaintiff to overcome a series of pre-defined hurdles, or making an exhaustive enquiry into whether the circumstances fit within the principles established in previous cases.⁴⁴⁴

2.206 It is unclear whether or not the principles of *laches* and *acquiescence* may operate in cases where the statutory limitation period has been applied by analogy.⁴⁴⁵

(10) Actions for Restitution

2.207 Under section 11(1) of the *Statute of Limitations*, actions founded on quasi-contract may be taken up to 6 years from the date of accrual of the cause of action. This body of law has in recent years come to be known as the law of restitution, which has been concisely summarised as “the law concerning the rectification of unjust enrichment.”⁴⁴⁶ This contrasts with the situation in England and Wales, where there is no parallel provision applicable to this area of the law.

2.208 Unjust enrichment occurs where a defendant was enriched by a benefit gained at the plaintiff’s expense, in circumstances where it would be unjust to allow the defendant to retain the benefit received.⁴⁴⁷ Brady and Kerr suggest that a cause of action will accrue when the plaintiff pays money to the defendant or to the defendant’s use, or where he supplies goods and services, as the case may be.⁴⁴⁸

2.209 Section 72(1) of the *Statute* governs claims arising from mistake (e.g. claims for restitution of money paid under a mistake of fact). Under this section, the limitation period begins to run only once the plaintiff has, or could with reasonable diligence have discovered the mistake.⁴⁴⁹

(11) Arbitrations

2.210 The *Statute of Limitations 1957* applies to arbitrations as it applies to actions in the High Court.⁴⁵⁰ An arbitrator is bound to give effect to any limitation defence. The arbitration must be commenced within the limitation

⁴⁴⁴ Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 31.

⁴⁴⁵ Delany *Equity and the Law of Trusts in Ireland* (3rd ed 2003) at 27-8, citing *Hampton v Minns* [2002] 1 WLR 1, 33.

⁴⁴⁶ Keirse “The Law of Restitution Reconsidered” (2006) 13(3) CLP 75.

⁴⁴⁷ Goff & Jones *The Law of Restitution* (5th ed 1998) at 15.

⁴⁴⁸ Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 203.

⁴⁴⁹ Section 72(1), *Statute of Limitations 1957*.

⁴⁵⁰ See Part IV (sections 74-80), *Statute of Limitations 1957*.

period.⁴⁵¹ Arbitrators have no power to dismiss a claim on the grounds of inordinate and inexcusable delay; this power is available only to the courts.

2.211 The High Court may order that an arbitration award be set aside, or may order that it cease to have effect with respect to the relevant dispute. At this point, the Court may order that the period between the commencement of the arbitration and the date of the Court's order is to be excluded from the computation of the running of the limitation period.⁴⁵²

2.212 The reform of the law of limitation as it applies to arbitrations is outside of the scope of this Consultation Paper; the Commission has recently published a Consultation Paper on *Alternative Dispute Resolution* and is currently preparing a Report on the subject.⁴⁵³

D The Running of the Basic Limitation Period

2.213 In general, the limitation periods under the *Statute of Limitations 1957* run from the date of accrual of the cause of action. Unless otherwise specified, the accrual of a right of action is governed by the common law.

2.214 Subject to the specific exceptions set out below, no general discoverability rule applies in Ireland at present.⁴⁵⁴

2.215 A test setting out a "date of knowledge" in relation to latent personal injuries, from which a limitation period of three years runs, was introduced by section 3 of the *Statute of Limitations (Amendment) Act 1991*. That Act implemented certain of the recommendations of the Commission's 1987 Report on *Claims in Respect of Latent Personal Injuries*.⁴⁵⁵ Section 2(1) of the 1991 Act sets out the facts that must be within the actual or constructive knowledge of the plaintiff before he or she is said to have "knowledge" of the cause of action such that the limitation period should be running against him or her:

- a) that the person alleged to have been injured has been injured
- b) that the injury in question was "significant"

⁴⁵¹ As to the date of "commencement" of an arbitration, see section 74, *Statute of Limitations 1957*.

⁴⁵² Section 77, *Statute of Limitations 1957*.

⁴⁵³ Law Reform Commission *Consultation Paper on Alternative Dispute Resolution* (July 2008) (LRC CP - 50 2008).

⁴⁵⁴ *Hegarty v O'Loughran* [1990] 1 IR 148, Finlay CJ effectively overruling the decision of Carroll J in *Morgan v Park Developments* [1983] ILRM 156.

⁴⁵⁵ Law Reform Commission *Report on The Statute of Limitations: Claims in respect of Latent Personal Injuries* (LRC 21-1987).

- c) that the injury is attributable (in whole or in part) to the act or omission which is alleged to constitute negligence, nuisance or breach of duty
- d) the identity of the Defendant, and
- e) if it is alleged that the act or omission that caused the injury was that of a person other than the Defendant, the identity of that person, and the additional facts supporting the bringing of an action against the Defendant.

2.216 Section 2(1) of the 1991 Act further provides that “knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant”. Section 2(2) provides that a person is fixed with knowledge that he might reasonably have been expected to acquire from facts observable or ascertainable by him, or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek. This section adds an objective element to the date of knowledge test. Any harshness that might derive from the objective element of the date of knowledge test is mitigated, however, by section 2(3), under which a person is not fixed with knowledge of a fact that is ascertainable only with the help of expert advice so long as that person has taken “all reasonable steps to obtain (and, where appropriate, to act on) that advice. Moreover, an injured person who, as a result of his injury, fails to acquire knowledge of a fact relevant to his injury, is not fixed with knowledge of that fact.

2.217 The ‘date of knowledge’ test also applies to fatal injuries actions under the *Civil Liability Act 1961*,⁴⁵⁶ personal injuries actions under section 13(7) of the *Sale of Goods and Supply of Services Act 1980*,⁴⁵⁷ and defective products actions.⁴⁵⁸ Actions in respect of damage by a dog in an attack on a person, or for injury done by a dog to livestock⁴⁵⁹, are considered ‘personal injuries actions’, and the date of knowledge test therefore also applies to such actions.⁴⁶⁰ The date of knowledge test is further discussed in Chapter Four (see page 191).

⁴⁵⁶ Section 6(1), *Statute of Limitations (Amendment) Act 1991*,

⁴⁵⁷ Section 3(3), *Statute of Limitations (Amendment) Act 1991*

⁴⁵⁸ Section 7, *Liability for Defective Products Act 1991*.

⁴⁵⁹ Such actions are taken under section 21(4) of the *Control of Dogs Act 1986*, as amended.

⁴⁶⁰ See section 3(4), *Statute of Limitations (Amendment) Act 1991*.

E Ultimate Limitation Periods

2.218 'Ultimate' or 'long stop' limitation periods are not a common feature of the current law of limitation in Ireland, subject to the exceptions set out below.

2.219 An ultimate limitation period of sorts applies in respect of a small number of land-related actions, running for 30 years from the date on which the right of action first accrued. This applies irrespective of disability or infancy.⁴⁶¹

2.220 A further variation of ultimate limitation period applies under the non-statutory National House Building Guarantee Scheme (HomeBond),⁴⁶² which was set up to provide home owners with a warranty against major structural defects. Dwellings constructed by the members of HomeBond (builders and developers) come within the scheme. A 10-year liability period applies for "major structural defects",⁴⁶³ running from the issue of the Final Notice.⁴⁶⁴ A two year liability period applies to water and smoke penetration.

2.221 Under the *Liability for Defective Products Act 1991*, which implemented the 1985 EC Directive on Product Liability, 85/374/EEC, a 10 year ultimate limitation period applies to actions. Section 7(2)(a) of the 1991 Act, which implements Article 11 of the 1985 Directive, states that this limitation period runs from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the

⁴⁶¹ Section 49(1)(d), *Statute of Limitations 1957*.

⁴⁶² This Scheme was established by the Construction Industry Federation and the Irish Home Builders Association, in conjunction with the Department of the Environment, after publication of the Law Reform Commission's *Working Paper on the Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises* (LRC-WP1, June 1977). See also the Commission's *Report on Defective Premises* (LRC 3 - 1982), which acknowledged the non-statutory scheme but which also recommended the enactment of a statutory framework for the duties discussed – and which would have included limitation periods. No statutory scheme has been enacted on foot of that Report, and the non-statutory HomeBond scheme remains in place.

⁴⁶³ Defined as "any major defect in the foundations of a dwelling or the load bearing part of its floors, walls and roof or retaining walls necessary for its support which affects the structural stability of the dwelling". This excludes minor structural defects and other non-structural defects; defects consequent upon negligence other than that of the HomeBond member or a sub-contractor; defects for which compensation is provided by legislation or which is covered by insurance; and various other minor defects.

⁴⁶⁴ HomeBond Scheme, rule 50(n).

meantime instituted proceedings against the producer. This applies regardless of whether the cause of action has accrued at that time.⁴⁶⁵ This has the effect of extinguishing the injured party's rights after the expiry of 10 years from the relevant date, irrespective of the injured party's minority or mental capacity, for example. This ultimate limitation period applies only to actions under the 1991 Act and does not apply to product liability claims brought under the common law duty of care of manufacturers and producers (which is not affected by the 1991 Act).

2.222 The Commission discusses ultimate limitation periods in more detail in Chapter 5.

F Judicial Discretion

2.223 Until the enactment of the *Defamation Act 2009*, Irish law had contained just one example (section 46(3) of the *Civil Liability Act 1961*, discussed above) of a judicial discretion to extend or dis-apply statutory limitation periods.

2.224 As noted above, the *Defamation Act 2009* amended section 11(2) (c) of the *Statute of Limitations 1957* so as to provide for two alternative limitation periods for defamation periods: a one-year basic limitation period for defamation actions, running from the date of accrual *or* a limitation period running for "such period as the court may direct not exceeding 2 years", starting at the date of accrual. In this way, the Act installed judicial discretion into the law of limitations in Ireland for the first time.

2.225 The court's discretion to extend the limitation period under section 11(2)(c) is not unfettered. Rather, it is subject to:-

- (1) A two-year long-stop, and
- (2) Statutory guidelines for the exercise of the discretion.

2.226 The courts have no discretion to extend the basic limitation period beyond two years running from the date of accrual of the cause of action.⁴⁶⁶ No defamation action can be commenced after this date, unless extended by the postponement provisions of the *Statute of Limitations 1957*. In this way, the *Defamation Act 2009* imposes a two-year ultimate limitation period. This diverges from the recommendation in the 2003 *Report of the Advisory Committee on the Law of Defamation* (the Mohan Committee), which had recommended a six-year long-stop.

⁴⁶⁵ Section 7(2)(b), *Liability for Defective Products Act 1991*.

⁴⁶⁶ Section 11(2)(c), *Statute of Limitations 1957* as amended by section 38(1)(a), *Defamation Act 2009*.

2.227 The 2009 Act also inserts a new section 11(3A) into the *Statute*⁴⁶⁷ to provide guidance as to the exercise of the court's discretion under the amended section 11(2)(c). Under section 11(3A), the court must be satisfied, before directing the extension of the basic limitation, that:

- a) The interests of justice require the giving of the direction, *and*
- b) The prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given.

2.228 Part (b) reflects the balance of prejudice, as recommended by the Mohan Committee, but differs significantly from the provisions of sections 32A and 33 of the UK *Limitation Act 1980*.

2.229 It is also mandatory under section 11(3A) for the court to have regard, when deciding whether or not to exercise its discretion, to the reason for the plaintiff's failure to bring the action within the limitation period specified in section 11(2) (c). Additionally, it is mandatory for the court to have regard to the extent to which any evidence relevant to the matter is, by virtue of the delay, no longer capable of being adduced.⁴⁶⁸ Though slightly rephrased, this section reflects the recommendation made by the Mohan Committee.

G Dismissal for Want of Prosecution

2.230 The courts have an inherent discretion to strike out proceedings or dismiss claims where there has been undue delay in the prosecution of the claim. That discretion may be exercised even where the statutory limitation period has not yet expired, although the exercise of the discretion in that manner has occurred only where lengthy periods have elapse during which the running of the limitation period was postponed such that the defendant is prejudiced in the presentation of his defence.

2.231 The *Statute of Limitations 1957* does not refer to or provide any guidance with regard to the courts' inherent discretion to dismiss cases. As a result, lay litigants may be unaware of this discretion, and may be prejudiced by this lack of knowledge. This jurisdiction or discretion is discussed in Chapter 7 below.

⁴⁶⁷ See section 11(3A), *Statute of Limitations 1957* as inserted by section 38(1)(b), *Defamation Act 2009*.

⁴⁶⁸ Section 11(3A), *Statute of Limitations 1957*, inserted by section 38(1) (b), *Defamation Act 2009*.

H Postponement or Extension of the Limitation Period

2.232 Part II of the *Statute of Limitations 1957*, which sets the length of the fixed limitation periods applicable to various causes of action, opens with the following caveat:-

“The subsequent provisions of this Part of this Act shall have effect subject to the provisions of Part III of this Act which provide for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud and mistake.”⁴⁶⁹

2.233 Part III of the *Statute* is a crucial component of the traditional limitations system, and an understanding of postponement is crucial to an understanding of the limitations system. As is clear from the caveat above, Part III provides the rules governing the postponement of running of the various fixed limitation periods in the event of:

- The plaintiff’s age or absence of capacity (called disability in the 1957 Statute);
- Acknowledgement by the defendant;
- Part-payment by the defendant;
- The defendant’s fraud; or
- Mistake.⁴⁷⁰

2.234 The Commission returns to discuss these postponement provisions in detail in Chapter 8 below.

I Practice and Procedure

2.235 Although it is not intended to give any great of consideration in this Consultation Paper to the practice and procedure of the courts in respect of limitation periods, the Commission considers it relevant to address a small number of pertinent issues in that respect, with a view to gaining as comprehensive an overview as possible of the operation of the *Statutes of Limitations* and the associated problems.

(1) Effect of Expiry of the Limitation Period

2.236 Limitations statutes have, over the centuries, been uniformly interpreted so as to create a defence for a defendant who successfully asserts

⁴⁶⁹ Section 10, *Statute of Limitations 1957*.

⁴⁷⁰ Part III is divided into five chapters: (I) Interpretation; (II) Disability; (III) Acknowledgement; (IV) Part Payment; and (V) Fraud and Mistake.

such a statute.⁴⁷¹ The nature of this defence depends on the nature of the action commenced by the plaintiff. The general rule is that when the limitation period applicable to a cause of action expires, the remedy may be barred if the defendant pleads the *Statute* and may be entitled to a defence. This defence does not challenge the plaintiff's claim on its merits; rather, it gives the successful defendant a complete immunity from any liability under the claim, regardless of the merits of the claim. If the defendant succeeds, the plaintiff will no longer be able to enforce the right asserted, relative to the violation alleged.

2.237 The defendant must expressly plead the *Statute* in order to avail of the limitation defence; the defence is not self-executing upon the expiry of the limitation period.⁴⁷² A court will not raise the matter of time of its own motion. Thus, it is open to a defendant who might otherwise plead the *Statute* to choose not to do so. If the defendant elects to contest the case on its merits or fails to plead the *Statute*, the plaintiff may still obtain his remedy, even though the limitation period has expired. In this way, the *Statute* has no effect unless and until pleaded.

2.238 Failure to initiate proceedings within the relevant period does not extinguish the plaintiff's rights. The right asserted will remain intact; it is merely the method of enforcement of that right that is affected. Thus, where the defendant chooses to plead the *Statute*, the plaintiff retains other options to enforce his or her right outside of the courts. In this sense, the effects of the Statutes are procedural rather than substantive in nature.

2.239 There are important exceptions to this general rule, the most important of which applies to actions to recover land. In such cases, the expiry of the limitation period extinguishes the title of the property of the legal owner along with the remedy after the limitation period has expired.⁴⁷³ Thus, where a stranger has been in adverse possession of land held on trust for 12 years, the landowner's title - along with his remedies - will be extinguished. The effect of extinguishment was not immediately clear. It was initially thought that the estate or interest of the dispossessed owner of the land was conveyed to the person who was in adverse possession. In respect of freehold estates, the person who is in adverse possession of the land "acquires a title which is as

⁴⁷¹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 142.

⁴⁷² See e.g. *AB v The Minister for Justice, Equality and Law Reform* [2002] 1 IR 296, 305.

⁴⁷³ Section 24, *Statute of Limitations 1957*.

good as a conveyance of the freehold.”⁴⁷⁴ The situation in respect of leasehold estates was not as straightforward. This is discussed in the Commission’s 2002 *Report on Title by Adverse Possession*.⁴⁷⁵

2.240 The *Statute* applies to registered land as it applies to unregistered land.⁴⁷⁶ Where a person claims to have acquired a title to registered land by possession, that person may apply to the Registrar to be registered as the owner of the land.⁴⁷⁷ The Registrar may cause the applicant to be registered as the owner if satisfied that the applicant has acquired the title. The Registrar may register the applicant with absolute, good leasehold, possessory or qualified title to the land, as the case may require. This registration is without prejudice to any right not extinguished by such possession. This registration has the effect of extinguishing the title of the person whose right of action to recover the land has expired.⁴⁷⁸

2.241 The exception to the general rule does not apply to actions to recover land held on trust, including a trust for sale, or actions to recover settled chattels.⁴⁷⁹ At the time of expiry of the limitation period available to a trustee who seeks to bring an action to recover land, the trustee’s legal interests in the land is not extinguished so long as the right of action to recover the land of any person who is entitled to a beneficial interest in the land (i.e. any beneficiary) has not yet accrued or been statute-barred.⁴⁸⁰ This may be the case, for example, where the beneficiary is a minor or suffering from a disability when the right of action accrues to the trustee. It is only when the right of action has accrued to all beneficiaries and the limitation period has expired for all beneficiaries, that the trustee’s legal interest in the land is extinguished.⁴⁸¹

2.242 In sum, a plaintiff who is owed a statute-barred debt is fully entitled to it if he can obtain satisfaction otherwise than by legal proceedings, but where a plaintiff seeks to recover land his title to the land is extinguished after the expiration of the statutory limitation period.

⁴⁷⁴ Law Reform Commission *Report on Title by Adverse Possession of Land* (LRC 67 - 2002) at paragraph 1.03.

⁴⁷⁵ *Ibid* at paragraphs 1.04-1.11.

⁴⁷⁶ Section 49, *Registration of Title Act 1964*.

⁴⁷⁷ *Ibid* at section 49(2).

⁴⁷⁸ *Ibid* at section 49(3).

⁴⁷⁹ Sections 25(2) and 26(1), *Statute of Limitations 1957*.

⁴⁸⁰ *Ibid* at section 25(2).

⁴⁸¹ Section 25(2), *Statute of Limitations 1957*.

(2) Calculating the Limitation Period

2.243 In *McGuinness v Armstrong Patents Ltd*, McMahon J. held that the date on which the cause of action accrues is included in the limitation period.⁴⁸² This is in accordance with what is now set out in section 18(h) of the *Interpretation Act 2005*. Section 18 sets out the general rules of construction of an enactment.⁴⁸³ Sub-section (h) provides as follows:-

“*Periods of time*. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period.”⁴⁸⁴

2.244 This rule contrasts with that applicable in Britain and Northern Ireland, where the limitation clock begins to run on the day *after* such accrual.⁴⁸⁵ The jurisdictions are in agreement, however, that the period is extended to allow for the issue of a summons on the first day after time expires on which the relevant court office is open. Thus, according to Morris J. in *Poole v O’Sullivan*⁴⁸⁶ in the event that the commencement of proceedings requires an act on the part of someone in the court office:

“[T]he period envisaged by the Statute of Limitations should be construed as ending on the next day upon which the offices of the Court are open and it becomes possible to do the act required.”⁴⁸⁷

2.245 If, however, the necessary act does not require any action on the part of someone in the court, time will not be extended.⁴⁸⁸

⁴⁸² [1980] IR 289.

⁴⁸³ “Enactment” is defined in section 2(1) as “an Act or a statutory instrument or any portion of an Act or statutory instrument”; “Act is defined so as to include an Act of the Oireachtas.

⁴⁸⁴ The 2005 Act repealed the *Interpretation Act 1937*. Section 11(h) of the 1937 Act contained a definition which was to like effect as that contained in section 18(h) of the 2005 Act.

⁴⁸⁵ See Brady & Kerr *The Limitation of Actions* (2nd ed Law Society 1994) at 28.

⁴⁸⁶ *Poole v O’Sullivan* [1993] ILRM 55.

⁴⁸⁷ *Poole v. O’Sullivan* [1993] ILRM 55, 57-58. See also *Prittam Kaur v S. Russell & Sons Ltd*. [1973] QB 336, which was applied by the Supreme Court in *DPP v McCabe* [2005] 2 IR 568.

⁴⁸⁸ See e.g. *Freeney v Bray Urban District Council* [1982] ILRM 29.

2.246 The situation is somewhat different again under the 1974 UNCITRAL *Convention on the Limitation Period in the International Sale of Goods*. Under that Convention, the limitation period is calculated in such a way that it expires at the end of the day what corresponds to the date on which the limitation period began to run. If there is no such corresponding date, the limitation period expires at the end of the last day of the last month of the limitation period.⁴⁸⁹ Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* which precludes the appropriate legal action being taken in the relevant jurisdiction, the limitation period is extended such that it does not expire until the end of the first day thereafter on which the appropriate legal action can be performed allowing proceedings to be instituted or a claim to be asserted.⁴⁹⁰

2.247 In *Tennyson v Dun Laoghaire Corporation*,⁴⁹¹ Barr J. held that the time limits for judicial review proceedings apply to the date on which the initial application for leave is made. For this reason, the adjournment of an application for leave to a date outside the two month time limit laid down in relation to planning decisions did not affect compliance with the time limit in circumstances where the initial application was made within the relevant time limits.⁴⁹²

(3) Set-Offs and Counterclaims

2.248 For the purposes of the *Statute*, “any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set off or counterclaim is pleaded.”⁴⁹³ Thus, a set-off or counterclaim is considered to be a new action. The date on which the limitation period stops to run in respect of this new action is the date of the commencement of the set-off or counterclaim proceedings. The *Statute* brought the situation in respect of set-offs and counterclaims into line. Until 1959, the situation was different: time ran against the set-off until the beginning of the action in which the set-off was raised and time ran against the counterclaim until the date on which the counterclaim was pleaded.

J General Problems with the Current Law

2.249 The Commission’s discussion in this Chapter indicates that the array of different limitation periods and the many rules governing their application

⁴⁸⁹ Article 28, *Convention on the Limitation Period in the International Sale of Goods*.

⁴⁹⁰ *Ibid* at Article 29.

⁴⁹¹ *Tennyson v Dun Laoghaire Corporation* [1991] 2 IR 527.

⁴⁹² See “Practice and Procedure (Judicial Review Proceedings - Discretionary Factors - Effect of Delay)” (2000) 7 DULJ 236.

⁴⁹³ Section 6, *Statute of Limitations 1957*.

leads, almost inevitably, to some degree of confusion. The limitation periods are themselves the cause of litigious disputes, and often materially influence the nature of the cause of action relied upon by plaintiffs. This runs counter to the recognised principle that, as far as possible, limitation periods should be clear, logical and of general application.

2.250 The Commission now turns to discuss and summarise the main problems that affect the application of statutory limitation periods in Ireland.

(1) Complexity

2.251 The limitation regime as it applies at present in Ireland is unnecessarily complex. As can be seen from the discussion in this Chapter, there are many exceptions to general rules and a number of complex interpretive issues that continue to be litigated, some of which have shown up gaps in the law. There is no ‘golden thread’ running through the limitations system, determining the length, running, postponement and expiry of the limitation periods. Moreover, some of the rules, such as those determining the date of accrual, remain governed by common law and are difficult to ascertain and understand, even for experienced practitioners.

(2) Incoherence

2.252 The Irish law of limitations is incoherent, primarily owing to the manner in which the law has developed since 1540. Little thought has been given in recent times to the principles underlying the general limitations system applicable under the *Statute*. Instead, a piecemeal approach has been taken to tackling problems as they arise. This has resulted in a disjointed body of limitation periods, to which different rules and principles have been applied. Long-stop periods, discoverability rules and judicial discretion feature infrequently and with no clear basis for their application to some actions, and their dis-application to others.

(3) Lack of Clarity

2.253 The law of limitation lacks clarity in a number of areas. It is, for example, unclear what precisely is included in the category of actions to “recover a sum recoverable by virtue of any other enactment”.⁴⁹⁴ This makes the law inaccessible and encourages unnecessary litigation. In sum, the Commission agrees with the sentiment expressed by the Law Commission for England and Wales that “[s]implification is both necessary and achievable.”⁴⁹⁵ Undue uncertainty should be avoided, as far as possible, in limitation law.

⁴⁹⁴ Section 11(1), *Statute of Limitations 1957*.

⁴⁹⁵ Law Commission of England and Wales *Limitation of Actions* (Consultation Paper No 151, 1998) paragraph 1.2.

2.254 This lack of clarity is reinforced by the many, ad-hoc, amendments to the 1957 Statute in the intervening 50 years since it came into force. This would be alleviated to some extent by the availability of a formal Restatement (administrative consolidation) of the Statute. The Commission has included the 1957 Statute in the list of Acts in its *First Programme of Statute Law Restatement*.⁴⁹⁶

(4) Classification Difficulties

2.255 Classification difficulties exist within the law of limitations as it stands at present. The existence of different limitation period for different categories of action creates unnecessary confusion and gives plaintiffs an incentive to try to bring their action within one category rather than another.⁴⁹⁷ Moreover, the design of categories is problematic, and poses difficult interpretive problems, thereby increasing the risk of inappropriate, overlapping and ambiguous limitation provisions.⁴⁹⁸ In addition, with ongoing changes in the general law of civil liability, often in statutory form, and which have no *direct* connection to limitations law, there has been an *indirect* effect on the scope of the categories in the 1957 Statute because the statutory changes to civil liability law often use concepts such as “negligence” or “damages” which the 1957 Statute uses in order to determine a limitation period. The disconnect between these developments will often make the categories defined by these terms inappropriate and ambiguous.⁴⁹⁹

2.256 An example of such a classification difficulty exists in relation to the torts of trespass to the person and personal injuries. In *Devlin v Roche & Others*,⁵⁰⁰ the plaintiff claimed damages for assault and battery, negligence, breach of duty and breach of statutory duty. The Supreme Court held that the phrase “breach of duty” in section 3(1) of the *Statute of Limitations*

⁴⁹⁶ See Law Reform Commission *Report on Statute Law Restatement* (LRC 91-2008) at 103. Brady & Kerr *The Limitation of Actions* (2nd ed Law Society 1994) is an annotated commentary on the full text of the Statute, taking account of amendments to 1994. The Commission is also aware of other informal Restatements of the 1957 Statute.

⁴⁹⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 281.

⁴⁹⁸ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 80-82.

⁴⁹⁹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 78-84.

⁵⁰⁰ *Devlin v Roche & ors* [2002] 2 IR 360.

(Amendment) Act 1991 does not encompass intentional trespass to the person. A distinction has been made, therefore, for limitation purposes between actions seeking damages for personal injuries sustained as a result of intentional trespass to the person, and personal injuries sustained as a result of nuisance, negligence or breach of duty. Actions for intentional trespass to the person are subject to the general, fixed six-year limitation period running from the date of accrual. Thus, no discoverability principles apply, and a plaintiff may find him or herself statute-barred owing to what might be said to be an artificial classification. This gives rise to confusion, particularly as the ingredients of the respective torts are virtually identical. Moreover, there is potential for further problems because the English decisions on which the Irish Supreme Court relied in *Devlin* have, since then, been overruled by the UK House of Lords in *A v Hoare*.⁵⁰¹

2.257 The Commission considers that ambiguity of this kind is an undesirable feature of a system of limitation. To the greatest extent possible, such systems should be unambiguous.

(5) Irrelevance

2.258 The Irish limitations system is based on the traditional method of setting fixed limitation periods, running from accrual. As seen above, although the rules are set out in a relatively modern Statute, the length of these limitation periods in many instances was set in the 17th or 18th century, in an age before computers, when communication and the retrieval of information were slow and cumbersome,⁵⁰² when documents and correspondence had to be sent by horse or ship. As noted by the Alberta Institute of Law Research and Reform:-

“Perhaps the limitations system at law functioned well in England before the industrial revolution. Since that time, however, industrial, commercial and government institutions have become exceedingly complex and populations have grown dramatically. With these changes the law has become larger and more intricate; additional rights have been recognized and the battery of remedies available for the infringement of right has been enlarged.”⁵⁰³

2.259 It is clear that the socio-economic environments that existed in England in 1623 and in Ireland in the early 21st Century are beyond comparison.

⁵⁰¹ [2008] 2 WLR 311.

⁵⁰² Law Commission of England and Wales *Limitation of Actions* (Consultation Paper No 151, 1998) at 3.

⁵⁰³ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 69.

The limitation periods that remain applicable in modern times reflect the preservation of traditional distinctions that are no longer of relevance. One example is the difference between actions on a simple contract and actions on a specialty. The *Statute* also makes reference to some actions and concepts that are now obsolete (e.g. actions for arrears of dower).⁵⁰⁴ Thus, our present limitations remain firmly rooted in the past. The Commission considers that it is essential that the law on limitation periods should be modern, relevant and clear.

(6) *Time-Wasting and Costliness*

2.260 Because the current limitations system is complex and unclear, litigation as to the meaning of the law and the classification of actions can be costly and lengthy. The lack of clarity in the law encourages litigation, which contributes to judicial workload and slows down litigation in a general sense. This is an expensive process for the State through expenditure on court resources, and for the parties involved in civil litigation.

2.261 In addition, failure to ensure a fixed, readily ascertainable date on which the defendant can no longer be subject to a claim means that individuals and businesses must, for example, retain records and maintain indemnity insurance for longer periods for fear they may be subject to claims many years after the act or omission in question. This is costly and unnecessary.

(7) *Inaccessible*

2.262 The complexity and incoherence of the current law of limitations means that the law is inaccessible even for experienced practitioners, and to a greater extent for litigants and the wider public. The language used in the 1957 Statute is, in many places, archaic and highly legalistic, and the rules are unnecessarily technical. This is unacceptable, particularly as individuals may be statute-barred owing to lack of knowledge or understanding of the limitation periods running against them. The Commission considers that a limitations system should be comprehensible for all persons who may be affected by it, whether lawyers or laypersons.

K Conclusion and Provisional Recommendation

2.263 The Commission considers the limitations system, as it stands, to be unsatisfactory, and is of the view that a fundamental root-and-branch change is necessary. The law of limitations should be clear, modern, simple, accessible and fair. It should limit the time available for the litigation of disputes that must be litigated, but should not encourage litigation. The Commission has,

⁵⁰⁴ Dower was abolished by section 3 of the section 11(2) of the *Succession Act 1965*.

accordingly, come to the provisional conclusion that the principal legislation governing limitation of actions, the *Statute of Limitations 1957* (as amended), is unnecessarily complex and is in need of fundamental reform and simplification.

2.264 *The Commission provisionally recommends that, since the principal legislation governing limitation of actions, the Statute of Limitations 1957 (as amended) is unnecessarily complex, it is in need of fundamental reform and simplification.*

CHAPTER 3 **MODELS FOR REFORM: A CORE LIMITATION REGIME?**

A Introduction

3.01 Recent years have seen several law reform agencies undertake a general review of limitation law. In this regard, the Law Reform Commission of Western Australia noted:-

“No longer are law reform bodies looking to produce a traditional Act setting out a number of different limitation periods for different causes of action, all running from the time of accrual: instead, they are suggesting new concepts such as general limitation periods, the adoption of limitation periods which run not from accrual but from some other starting-point, and ultimate or “long stop” limitation periods beyond which no extension of the ordinary period is possible.”¹

3.02 A trend that has emerged from the general reviews carried out in various jurisdictions is the consideration of what has been called “a core limitations regime”. This Chapter examines the key features of core regimes recommended and enacted in various other jurisdictions, and analyses the potential for such a regime to be introduced in Ireland.

3.03 In Part B, the Commission examines the key elements of a core limitations regime: a uniform basic limitation period; a uniform commencement date; and a uniform ultimate limitation period. In Part C, the Commission examines the main arguments concerning the desirability of a core limitations regime. In Part D, the Commission explores in detail the various models for core limitations regimes that have been recommended, and introduced, in other States. In Part E, the Commission draws its conclusions from this discussion and makes a key recommendation on the introduction of a core limitations regime.

B What is a “Core Limitations Regime”?

3.04 A core regime is essentially a uniform approach to limitations law, with fairness, clarity and simplicity at its foundation. The key feature of the

¹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997) at 43.

various core regimes recommended by other jurisdictions has been the introduction of the following three standards for the majority of civil actions:

- A uniform basic limitation period
- A uniform commencement date
- A uniform ultimate limitation period.

3.05 As recommended, these three standard features apply to all civil action, with limited exceptions.

C Why Introduce a Core Regime?

3.06 The wide range of disparate and disjointed provisions set out in Chapter Two show that the *Statute of Limitations 1957* is very complex. This is principally because it attempts to provide a separate limitation rule for a wide range of actions, and also because a piecemeal approach has been taken to the reform of limitations law. The *Statute* sets one set of rules for various actions in contract, another for tort actions in general, and another for specific other tort actions, and so on. The *Statute* also specifically excludes other forms of civil litigation entirely. The date on which the various limitation periods accrue or being to run is not always clear, and problems of classification frequently arise. Also, the *Statute* is drafted in archaic, technical language, and is consequently difficult to understand. As a result, limitations law is perplexing for practitioners, and inaccessible for non-lawyers.

3.07 The introduction of a new Limitations Act in Ireland would allow for a thorough simplification of limitations law, and would provide an opportunity to rectify anomalies existing in the current law that have the potential for create injustice to plaintiffs and defendants. It would also deal appropriately with new problems as they emerge, increase clarity, and contribute to predictability in limitations law. It would, further, eliminate problems of classification and categorisation. The Commission has already made a great number of recommendations in the area of limitation, some of which have not yet been implemented. Those recommendations that await implementation could be incorporated into a new Limitations Act. In addition, the Commission agrees with the Law Commission of England and Wales that core regime would be “coherent, certain, clear, just, modern and cost-effective.”²

3.08 Fundamentally, the Commission considers that the flaws that may be attributed to the existing *Statute* are not capable of rectification by a modest revision of the law as it stands. Instead, what is needed is a “root and branch”

² Law Commission of England and Wales *Limitation of Actions* (Consultation Paper No 151, 1998) paragraph 1.5.

reform, a goal that could be met by a break from the traditional model and the introduction of a conceptually new limitations regime.

D Models for a Core Regime

3.09 A core limitation regime has been considered in the following jurisdictions, among others:

- (1) Alberta
- (2) Western Australia,
- (3) England and Wales, and
- (4) New Zealand.

3.10 There follows an analysis of the models recommended and/or enacted in each of these jurisdictions.

(1) Alberta

3.11 In the 1970s and '80s, the Institute of Law Research and Reform of Alberta carried out a study of its traditional limitations statute, under which the various established causes of action were identified and specific limitation periods assigned to each.³ Initially, this study was undertaken with a view to revising the existing statute of limitations. Over time, however, members of the Institute developed "a distinct sense of unease" with the existing statute, and with conventional limitations statutes. The Institute found that the existing model was "complex, prolix, conceptually confused" and gave rise to unfair results⁴

3.12 The report for discussion published by the Institute in 1986 might be said to be the seminal work in this area. In that report, the Institute stated:

"Our conclusion is that there is neither a sound theoretical nor practical foundation for the practice of assigning different limitation periods to different categories of claim. [...] Not only do we think that the use of different categories of claims serves no useful purpose; we think that the practice results in limitation periods which are too often unreasonable, either to claimants or to defendants. [...] As law, with its rights and remedies, has grown more complex, the unusual has become more usual, and claims cannot be placed into categories with any reliable relevance to their discovery periods, economic importance, or vulnerability to deteriorated evidence."⁵

³ See *Limitation of Actions Act* RSA 1980, c.L-15

⁴ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) preface.

⁵ *Ibid* at 77.

3.13 The Institute therefore recommended “that only one limitation period is required for all claims subject to a discovery rule and that this period can be relatively short and still fair to defendants.”⁶ The Institute chose to engage in a fundamental “root and branch” reform, from which evolved a systematic new limitations regime. This new regime drew from and combined elements of the traditional legal and equitable models of limitation.

3.14 In 1989, the Institute published a *Model Limitation Act*,⁷ employing a three-prong core limitation regime. This model has the key advantage of simplicity. Instead of a number of limitation periods running for various lengths from different dates of accrual, there is one basic limitation period running from the date of discovery. Provisions for the judicial extension of the limitation period were considered unnecessary.⁸ A long-stop period, running from the date on which the cause of action arose, provides balance by ensuring that there is a point at which the action is finally barred. Thus, the defendant’s interests are protected.

3.15 The Alberta model also has the advantage of clarity. It is easily understood by practitioners and litigants alike, and therefore reduces the possibility of a claimant finding themselves statute-barred due to their lack of knowledge or comprehension of limitation law. The uniformity of the Alberta rules also essentially eliminates problems of classification in that arise where different limitation periods are ascribed to different categories of claim. In addition, it reduces the potential for litigation on definitional issues.

3.16 The Institute’s *Model Limitation Act* was the foundation upon which a core limitation regime was introduced in Alberta in 1996, Ontario in 2002 and Saskatchewan in 2004, as well as the inspiration for the Uniform Law Conference of Canada’s *Uniform Limitations Act*, adopted in 2005, a Bill introduced by the New Brunswick Attorney General’s Office in December 2008,⁹ and a *Draft Report for Consultation* published by the Manitoba Law Reform Commission in June 2009.¹⁰

⁶ *Ibid* at paragraph 2.149.

⁷ Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 1.

⁸ Alberta Law Reform Institute *Limitations* (Report for Discussion No. 4, 1986), at paragraphs 2.150 - 2.155.

⁹ Bill 28, *Limitation of Actions Act*, 3d Sess., 56th Leg., 2008. The Standing Committee on Law Amendments held public hearings on Bill 28 on 24 February 2009 and reported to the Legislative Assembly on 2 June 2009.

¹⁰ Manitoba Law Reform Commission *The Limitation of Actions Act: Draft Report for Consultation* (15 June 2009).

(a) Application in Alberta

3.17 The Alberta *Limitations Act*¹¹ largely enacted the recommendations of the Institute's *Model Limitation Act*. It came into force on March 1, 1999.¹² The 1996 Act was *Limitations Act*,¹³ and amended in 2002 and 2007.¹⁴ The Alberta core regime applies to all claims for "remedial orders",¹⁵ subject to limited exceptions. The core features of the Alberta core regime, under the revised Act, are as follows:

¹¹ *Limitations Act* SA 1996 cL-15.1.

¹² Section 2(1), *Limitations Act* RSA 2000 c.L-12

¹³ *Limitations Act* RSA 2000 c.L-12.

¹⁴ See *Justice Statutes Amendment Act* SA 2002, c. 17 (with regard to disability, and minors); *Limitation Statutes Amendment Act* SA 2007 SA c22. See consolidate version up to 15 July, 2008 at <http://www.canlii.org/ab/laws/sta/l-12/20080715/whole.html>.

¹⁵ Defined in section 1(j), *Limitations Act* RSA 2000 cL-12.

ALBERTA	
<i>BLP</i>	2 years running from discoverability ¹⁶
<i>ULP</i>	10 years running from date on which claim arose. ¹⁷
<i>Exceptions</i>	<ul style="list-style-type: none"> • Claims for 'declarations' or 'enforcement orders'¹⁸ • Claims for habeas corpus;¹⁹ • Actions to recover land (subject to ULP);²⁰ • Actions by Aboriginal persons against the Crown based on breach of duty (subject to ULP);²¹
<i>Judicial Discretion</i>	None.
<i>Special Features</i>	Applies to legal and equitable claims alike.
	Allocates burden of proof. ²²

¹⁶ Section 3(1), *Limitations Act* RSA 2000 cL-12.

¹⁷ Section 3(1)(b), *Limitations Act* RSA 2000 cL-12.

¹⁸ Enforcement orders are issued only after the claim has been litigated. Where the enforcement order issues, the initial claim was brought within the prescribed limitation period. A ten-year limitation period applied to actions seeking one particular type of enforcement order - a judgment to pay money - running from the time when the claims arose. See section 11, *Limitations Act* SA 1996 cL-15.1.

¹⁹ It was considered offensive to impose a limitation period on an important remedy on claims involving civil liberties. See Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 3.62.

²⁰ Section 3(4), *Limitations Act* RSA 2000 cL-12. The discoverability rule is considered inappropriate for such actions. See further Law Reform Committee of Parliament *Twenty-First Report: Final Report on Limitation of Actions* (Cmnd. 6923, 1977), at paragraph 2.4.

²¹ Section 13, *Limitations Act* RSA 2000 cL-12. This exclusion was not part of the Alberta Institute's proposals, but was added to the Bill during its passage through Parliament, in order to avoid a landslide of claims before the Act came into force.

²² Section 5, *Limitations Act* RSA 2000 cL-12.

3.18 Actions are statute-barred at the expiry of the basic limitation period (2 years) or ultimate limitation period (10 years), whichever occurs earlier.²³ The basic and ultimate limitation periods begin to run at different times, the former from discoverability and the latter from the novel formulation of 'the date on which the claim arose'. This may be of little consequence, however, as in most instances, the date of discoverability will be the same as the date on which the claim arose. The basic and ultimate limitation periods will therefore generally run from the same date. The impact of this formulation is, nevertheless, that in the event of latent injury, the claim will be statute-barred after ten-years from the date on which the cause of action arose, irrespective of the inability of the plaintiff to discover the cause of action during that time.

3.19 The courts in Alberta have been given no discretion to extend or disregard the limitation period. This approach has been criticised being "too rigid" on the basis that "[f]ailure to discover the existence of the claim is not the only factor which may delay the issue of a writ".²⁴

(i) Recent Developments

3.20 In 2003, the Alberta Institute published two Reports on specific aspects of limitations law, namely adverse possession and insurance contracts.²⁵ In its report on adverse possession, the Institute raised the concern that as a result of the repeal of the *Limitation of Actions Act*,²⁶ the working of the limitation period regarding an owner's right for the recovery of possession of land may be unclear. In particular, concern was expressed that the identification of the starting point for the 10-year limitation period is now uncertain. The Institute recommended that clarity should be brought to when the 10-year period begins to run in cases involving the recovery of possession of land, and to the consequences of the expiry of the 10-year period. The *Limitation Statutes Amendment Act 2007*²⁷ was enacted to clarify the law and avoid unnecessary litigation the area of the recovery of possession of land, and

²³ Section 3(1), *Limitations Act* RSA 2000 cL-12.

²⁴ Law Reform Commission of Western Australia *Report on limitation and Notice of Actions* (Project 36(II), 1997) at paragraph 6.45. The Commission gave the example of child abuse cases brought years later. *Ibid*.

²⁵ Alberta Law Reform Institute *Limitations Act: Adverse Possession and Lasting Improvements* (Final Report No. 89, 2003); Alberta Law Reform Institute *Limitations Act: Standardizing Limitation Periods for Actions on Insurance Contracts* (Final Report No. 90, 2003).

²⁶ RSA 1980, c.L-15.

²⁷ SA 2007 c22. This was Bill 17 of 2007, and came into force on June 19,2007.

also in cases involving a conflict of laws between Alberta and another jurisdiction.²⁸

(b) Application in Ontario

3.21 The reform of Ontario's limitations law was first considered in 1969.²⁹ The *Ontario Limitations Act Consultation Group* published a report in 1991 that was based almost entirely on the Alberta Institute's 1989 *Model Limitation Act*, proposing a scheme similar to the Alberta model, under which every claim would be subject to a primary and ultimate limitation period.³⁰ This resulted in a *Limitations Bill 1992* which, if enacted, would have completely reformed the law of limitations, with the notable exceptions of limitations in real property actions.³¹

3.22 Following a prolonged process of consultation and negotiation,³² a core regime was enacted under the *Limitations Act 2002*,³³ which has since been amended.³⁴ The following are the features of this core regime:

²⁸ *Alberta Hansard*, April 11, 2007 (Second Reading of Bill 17 of 2007) at 526.

²⁹ Ontario Law Reform Commission *Report on Limitation of Actions* (1969). The Ministry of the Attorney General released a discussion paper in 1977, containing a draft bill with a brief commentary. The resulting Bill 160 of 1983 did not proceed beyond first reading.

³⁰ Ontario Limitations Act Consultation Group *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991).

³¹ Bill 99 of 1992, like Bill 160 of 1983, died on the order paper.

³² This was initiated by then Attorney General and resulted in Bill 163 of 2000, in which many of the proposals of the 1992 Bill were carried forward. The 2000 Bill was reintroduced as Bill 10 of 2001 and again, with some minor changes, as a schedule to Bill 213 of 2002, and passed without debate.

³³ S.O. 2002, c.24, Schedule B. This came into force on January 1, 2004. It is one of three Acts contained in the *Justice Statute Law Amendment Act*.

³⁴ See 2002, c.24, Schedule B, section 50; 2004, c.16, Schedule D, Table; 2004, c.31, Schedule 22; 2006, c.21, Schedule D; 2006, c.32, Schedule C, section 29; 2007, c.13, section 44. See Legislative Table at http://www.e-laws.gov.on.ca/html/tables/publicstatutesannotations/elaws_t_pu_st_an_T02I24.htm; consolidated version of the Act, dated September 8, 2008, at <http://www.search.e-laws.gov.on.ca/en/isysquery/c62addc2-e7dc-4629-a3f5-f8aa567cb5b4/1/frame/?search=browseStatutes&context>.

ONTARIO	
<i>BLP</i>	2 years, running from the date of discovery ³⁵
<i>ULP</i>	15 years, running from the day on which the act or omission on which the claim is based took place. ³⁶
<i>Exceptions</i> ³⁷	<ul style="list-style-type: none"> • Actions in respect of Real Property;³⁸ • Claims for declarations or enforcement orders; • Certain family law proceedings; • Proceedings to enforce arbitration awards; • Proceedings to recover collateral; • Proceedings based on aboriginal and treaty rights, • Provincial offences proceedings; • Sexual assault cases involving dominion; • Proceedings based on equitable claims by aboriginal peoples against the Crown;³⁹ • Actions in respect of certain breaches of trusts of land;⁴⁰ • Equitable actions;⁴¹ • Environmental claims that have not been discovered.⁴²
<i>Discretion</i>	None.
<i>Features</i>	Scheduling System

³⁵ Section 4, *Limitations Act*. SO 2002, c.24, Schedule B. For a definition of the date of discovery, see *ibid* at section 5.

³⁶ *Ibid* at section 15(2).

³⁷ *Ibid* at section 16.

³⁸ Part 1 of the original *Limitations Act*, dealing with real property, was preserved and renamed the *Real Property Limitations Act 1990*.

³⁹ See section 2(1), *Limitations Act* SO 2002, c.24, Schedule B.

⁴⁰ The basic limitation period does apply to actions in respect of a breach of trust, except where a beneficiary's rights arise in respect of land or rent vested in a trustee upon an express trust.

⁴¹ If the claim is for equitable relief, the doctrine of laches applies.

⁴² Section 17, *Limitations Act* SO 2002, c.24, Schedule B.

3.23 While this regime is modelled on the Alberta Institute's recommendations, certain differences apply. Unlike Alberta model, the Ontario ultimate limitation period runs from the time of the act or omission on which the claim was based, as opposed to the date on which the claim arose. A further difference is that the ultimate limitation period runs for 15 years in Ontario, in contrast to Alberta's 10 years. Furthermore, in Ontario, a scheduling system is employed whereas in Alberta, the regime applies to all 'remedial claims'.

(i) Scheduling System

3.24 The Ontario scheduling system involves the listing, in a Schedule to the Act, of special limitation periods to which the core regime does not apply. This scheduling system was first proposed in the Ontario *Limitations Bill 1992*, which provided that any limitation period set out in another Act would be ineffective unless the provision establishing it was specified in the schedule to the proposed *Limitations Bill 1992*.

3.25 The Schedule contained in the 2002 Act contains a list of the special limitation periods contained in other statutes which remain in force.⁴³ Limitation periods set by any Act that is not listed in the Schedule are not longer of any effect. The special limitation periods set out in the Schedule are, however, subject to some of the principles established by the core regime, including the provisions concerning postponement, dispute resolution and the ultimate limitation period.

(c) Application in Saskatchewan

3.26 In 1989, the Saskatchewan Law Reform Commission (SLRC) published *Proposals for a New Limitation of Actions Act*.⁴⁴ This contained a draft Act which if enacted, would have brought wide ranging changes to the law of limitations in the province. In 1997, the SLRC compared its draft 1989 Act with the *Uniform Limitations Act* adopted by the Uniform Law Conference of Canada in 1982.⁴⁵ The SLRC found that the differences between the two were relatively minor and concluded that both models remained a valid basis for the reform of limitations law. In 2003, the Department of Justice of Saskatchewan handed down *Proposals for Reform* in relation to limitation, similar to those

⁴³ Section 19, *Limitations Act* SO 2002, c.24, Schedule B.

⁴⁴ Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act* (1989).

⁴⁵ Law Reform Commission of Saskatchewan *Comparison of Proposals for Reform of the Limitations of Actions Act* (Research Paper, December 1997).

adopted in Alberta and Ontario.⁴⁶ This resulted in the *Limitations Act 2004*,⁴⁷ which was amended in 2007.⁴⁸

3.27 The core features of the Saskatchewan core limitation regime are as follows:

SASKATCHEWAN	
<i>BLP</i>	2 years, running from the date of discovery. ⁴⁹
<i>ULP</i>	15 years, from date on which the act or omission on which the claim is based took place. ⁵⁰
<i>Application</i>	All claims commenced by statement of claim, or by originating notice. ⁵¹
<i>Exceptions</i>	<ul style="list-style-type: none"> • Actions in respect of real property; • Appeals or Judicial review proceedings;⁵² • Proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples;⁵³ • Habeus Corpus proceedings;⁵⁴ • Claims for which a limitation period is set by another Act or by an international convention or treaty adopted by an Act;⁵⁵

⁴⁶ Department of Justice of Saskatchewan *Proposals for Reform: Limitation of Actions and Joint and Several Liability* (Regina: Department of Justice, 2003).

⁴⁷ SS 2004, c. L-16 1; came into force on May 1, 2005.

⁴⁸ See *Limitations Amendment Act* SS 2007, c.28.

⁴⁹ Section 5, *Limitations Act* SS 2004, c. L-16 1. For a definition of the date of discovery, see *ibid* at section 6(1).

⁵⁰ Section 7(1), *Limitations Act* SS 2004, c. L-16 1. This is subject to exceptions under sections 7(2) and (4), in the case of excessive conversions or fatal injuries.

⁵¹ Section 3(1), *Limitations Act* SS 2004, c. L-16 1.

⁵² Section 3(2), *Limitations Act* SS 2004, c. L-16 1.

⁵³ Section 3(2)(c), *Limitations Act* SS 2004, c. L-16 1.

⁵⁴ Section 3(2)(d), *Limitations Act* SS 2004, c. L-16 1.

	<ul style="list-style-type: none"> • Actions on a judgment or order for the payment of money;⁵⁶ • Claims for declarations or enforcement orders; • Proceedings to enforce arbitration awards; • Proceedings to recover collateral; • Claims by the Crown for unpaid fines;⁵⁷ • Actions in respect of assaults or sexual assaults, involving dominion.⁵⁸
<i>Judicial Discretion</i>	None

3.28 The Act applies to private individuals and to the Crown alike.⁵⁹ As with the Alberta model, the Saskatchewan Act expressly allocates the burden of proof.⁶⁰ It does not employ a scheduling system, as seen in the Ontario model.

(d) Uniform Law Conference of Canada

3.29 The Uniform Law Conference of Canada (“ULCC”) seeks to promote uniformity of legislation among the Canadian provinces, and prepares model and uniform statutes.⁶¹ It has adopted three model Limitation Acts. The first *Uniform Limitation of Actions Act*, adopted in the early 1930s, was well received and adopted in seven jurisdictions.⁶² The ULCC *Uniform Limitations Act* of 1982 contained a uniform limitation period running from the date of the act or

⁵⁵ Sections 3(4) and (5), *Limitations Act* SS 2004, c. L-16 1.

⁵⁶ Section 7.1, *Limitations Act* SS 2004, c. L-16 1. The limitation period runs for 10 years from the date of the judgment or order.

⁵⁷ See generally section 15, *Limitations Act* SS 2004, c. L-16 1.

⁵⁸ Section 16, *Limitations Act* SS 2004, c. L-16 1.

⁵⁹ Section 4, *Limitations Act* SS 2004, c. L-16 1.

⁶⁰ Section 18, *Limitations Act* SS 2004, c. L-16 1.

⁶¹ The Conference was first called the *Conference of Commissioners on Uniformity of Laws throughout Canada*. In 1919, the Conference changed its name to the *Conference of Commissioners on Uniformity of Legislation in Canada* and, in 1974, to the *Uniform Law Conference of Canada*.

⁶² Alberta (1935), Manitoba (1932, 1946), New Brunswick (1952), the Northwest Territories (1948), Prince Edward Island (1939), Saskatchewan (1932) and the Yukon Territory (1954).

omission giving rise to the action. This model was not very well received, and was adopted in only one jurisdiction.⁶³

3.30 In 2004, the ULCC set up a Working Group on Limitations and at its 2005 Conference adopted a *Uniform Limitations Act* based on limitations legislation enacted in Alberta, Saskatchewan and Ontario since 1982.⁶⁴ The central features of the *Uniform Limitations Act* are as follows:

UNIFORM LIMITATIONS ACT 2005 (ULCC)	
<i>BLP</i>	2 years, running from discoverability ⁶⁵
<i>ULP</i>	15 years, running from the day on which the act or omission on which the claim is based took place. ⁶⁶
<i>Exceptions</i>	<ul style="list-style-type: none"> • Claims in respect of assault, battery or trespass to the person involving dominion;⁶⁷ • Actions in respect of real property; • Environmental Claims; • Insurance Claims.⁶⁸ • Proceedings for declaratory judgments;

⁶³ Newfoundland and Labrador (1996).

⁶⁴ ULCC Conference 2005 (St John's, Nfld) *Civil Section Report: Uniform Limitations Act* (August 21-25 2005) paragraph 3. Available at http://www.ulcc.ca/en/poam2/Uniform_Limitations_Act_Rep_En.pdf.

⁶⁵ Section 4, ULCC *Uniform Limitations Act* (adopted 2005). For a definition of discoverability, see *ibid* at section 5.

⁶⁶ *Ibid* at section 6.

⁶⁷ Section 9, ULCC *Uniform Limitations Act* (adopted 2005). This would include claims in respect of sexual misconduct, including incest.

⁶⁸ The limitation period in insurance claims was dealt with in a separate publication in 2004. See ULCC Civil Law Section *Report on Limitation Periods in Insurance Claims* (2005 Conference). The ULCC Civil Section Steering Group continues to monitor this issue, and is working with the Canadian Council of Insurance Regulators to address the problems. Office of the Attorney General of Prince Edward Island *Uniform Law Conference Delegates Work to Harmonize Laws* (Press Release, September 13 2007).

	<ul style="list-style-type: none"> • Appeals and judicial review proceedings.⁶⁹
<i>Judicial Discretion</i>	None.
<i>Special Features</i>	Scheduling System

3.31 The ULCC core regime is consistent with the Alberta model except that it employs a scheduling system along the lines of the model enacted in Ontario in 2002.⁷⁰

3.32 The ULCC acknowledged that it was arguably arbitrary to assign a two and 15 year periods to the basic and ultimately limitation periods respectively. It was agreed, however, that two years was a sufficient time period within which to seek legal advice, consider the available options, and institute proceedings, once a claim is discovered.⁷¹ The ultimate limitation period was considered necessary to ensure that the interests of the defendant for finality and closure were not overlooked. The ULCC adopted the “arguably arbitrary” 15-year period simply because this was the period recommended by the Alberta Law Reform Institute.⁷²

(2) Western Australia

3.33 Until 2005, the *Limitation Act 1935 (Western Australia)*⁷³ governed the law of limitation in Western Australia. That Act was a consolidation of English Statutes dating from 1623 to 1878.⁷⁴ Many difficulties were associated with the Act, including the use of an archaic drafting style, the retention of obsolete legal concepts, the perpetuation of out-of-date distinctions, and a failure to reflect modern legal distinctions.⁷⁵

⁶⁹ Section 2, ULCC *Uniform Limitations Act 2005*.

⁷⁰ ULCC *Report of the Uniform Limitations Group Act Working Group: Is It Time for A New Uniform Limitation Act* (John Lee, Ontario Ministry of the Attorney General, 2004) paragraph 30.

⁷¹ See commentary on section 4, ULCC *Uniform Limitations Act 2005*.

⁷² See commentary on section 6, ULCC *Uniform Limitations Act 2005*.

⁷³ Act No. 035 of 1935 (26 Geo. V No. 35).

⁷⁴ *Limitation Act 1623, Civil Procedure Act 1833, Real Property Limitation Acts 1833 and 1874* and a number of other Acts.

⁷⁵ Law Reform Commission of Western Australia *30th Anniversary Report Implementation Report* (2002), at 124. See further Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997), at 61-70.

3.34 In 1997, the Law Reform Commission of Western Australia published a *Report on Limitation and Notice of Actions*,⁷⁶ in which it found that the 1935 Act was “too firmly rooted in its 19th century English origins for it to be possible to eliminate its defects and convert it into a satisfactory piece of legislation merely by amending it.”⁷⁷ The Commission made the following suggestion:

“What is required is a new Act, one which takes into account the reformed Acts in other jurisdictions and the latest thinking about the concepts of limitations law developed by law reform commissions and similar bodies in Australia and elsewhere.”⁷⁸

3.35 It might be said that the criticisms levelled at the Western Australia *Limitations Act 1935* are equally applicable to the Irish *Statute of Limitations 1957*, which is similarly rooted in the English statutes of the 18th and 19th centuries. Equally, the LRC of Western Australia’s propositions for reform have resonance in this jurisdiction.

(a) Proposed Core Limitations Regime

3.36 The Commission of Western Australia recommended the adoption of a modern limitation statute, in the form of a core regime. The central features of the recommended core regime are as follows:

⁷⁶ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997). This followed the Law Reform Commission of Western Australia’s *Discussion Paper on Limitation and Notice of Actions* (Project No. 36(II), 1992).

⁷⁷ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997), at paragraph 7.1.

⁷⁸ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936), at 7.

PROPOSED CORE REGIME: WESTERN AUSTRALIA	
<i>Core Limitation Period</i>	3 years, running from date of discoverability
<i>Long Stop</i>	15 years, from date on which the claim arose
<i>Exceptions</i>	<ul style="list-style-type: none"> • Actions to recover land;⁷⁹ • Actions in respect of mortgages;⁸⁰ • Actions to recover tax paid.⁸¹
<i>Judicial Discretion</i>	In exceptional cases

3.37 The recommendations of the Commission of Western Australia have not been implemented. Nevertheless, a new and updated limitations system was introduced under the *Limitation Act 2005*, and limitations enactments preceding this Act were repealed.⁸² This Act has introduced some of the features of a core limitations regime, to the exclusion of others.

(b) Current Limitations Regime

3.38 The 2005 Act introduced one basic limitation period that runs for six years from the date of accrual.⁸³ This is known as the “default limitation period.”⁸⁴ It applies to all causes of action apart from those specified in Division 3 of the Act which lists sixteen specific limitation periods which are either longer or shorter than the default limitation period. Subject to these exceptions, the six-year limitation period applies to all civil proceedings in a court, whether the

⁷⁹ With the exception of actions to recover arrears of rent.

⁸⁰ These actions in respect of mortgages would be subject to the ultimate period, but not the limitation period.

⁸¹ Actions to recover tax paid would be subject to a one-year limitation period.

⁸² Act No. 19 of 2005. The Act came into force on 15th November, 2005. The *Limitation Legislation Amendment and Repeal Act 2005* (WA) repealed all limitations acts preceding the 2005, but retained certain sections of those acts.

⁸³ Section 13(1), *Limitation Act 2005* (WA), Act No. 19 of 2005.

⁸⁴ Explanatory Memorandum, *Limitation Bill 2005 (Clause Notes)*, available at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Bills+-+All>.

claim is under a written law, at common law, in equity or otherwise.⁸⁵ It also applies to arbitrations.⁸⁶ Like the Alberta model, the Western Australia Act establishes the burden of proof.⁸⁷

3.39 The Act provides alternative limitation periods for equitable actions, namely either a six-year limitation period running from accrual, or a three-year period from when time started running, on equitable principles, for the commencement of the action.⁸⁸ These alternative limitation periods apply only to equitable actions that are not analogous to other actions and for which the limitation period would therefore not be determined in equity by analogy to the limitation period for any other kind of action.⁸⁹

3.40 Particularly detailed provisions are provided governing the extension of the limitation period for minors,⁹⁰ and persons with a mental disability.⁹¹ The Act makes provision for the judicial extension of the limitation period in cases of fraud and improper conduct,⁹² personal injuries and fatal injuries actions,⁹³ defamation cases,⁹⁴ or in cases where the court considers that it was unreasonable for the guardian of a minor plaintiff or the guardian of a person with a mental disability not to commence the action within the limitation period for the action.⁹⁵

3.41 There is also something of an ultimate limitation period, as the Act provides that notwithstanding the rules governing the postponement of the limitation period in the event of mental disability, no cause of action can be

⁸⁵ Section 3(1), *Limitation Act 2005 (WA)*, Act No. 19 of 2005. It does not apply to proceedings for certiorari, mandamus, prohibition, habeas corpus or quo warranto.

⁸⁶ Section 3(1), *Limitation Act 2005 (WA)*, Act No. 19 of 2005. This is subject to sections 29 and 88 of the Act.

⁸⁷ Section 79, *Limitation Act 2005 (WA)*, Act No. 19 of 2005.

⁸⁸ *Ibid* at section 27(1).

⁸⁹ *Ibid* at section 27(2).

⁹⁰ *Ibid* at sections 30-34.

⁹¹ *Ibid* at sections 35-37.

⁹² *Ibid* at section 38.

⁹³ *Ibid* at section 39.

⁹⁴ *Ibid* at section 40,.

⁹⁵ *Ibid* at sections 41 and 42, respectively. This does not apply in defamation actions. See *ibid* at sections 41(d) and 42(d).

brought by a person under disability more than 30 years after the cause of action accrued.⁹⁶ This might more properly be seen as a limited outer bar, but it has the same effect as an ultimate limitation period.

3.42 A selection of the special limitation periods, to which the six year limitation period does not apply, is as follows:-

SPECIAL LIMITATION PERIODS		
LENGTH	ACTIONS	RUNNING FROM
1 year	Defamation actions	Date of publication ⁹⁷
	Actions to recover tax mistakenly paid	Date of payment ⁹⁸
2 years	Actions for contribution	Date of accrual ⁹⁹
3 years	Personal Injuries	Date of accrual ¹⁰⁰
	Fatal Injuries	Date of death ¹⁰¹
	Trespass to the Person	Date of accrual ¹⁰²
12 years	Actions founded on a deed	Date of accrual ¹⁰³

⁹⁶ Section 36(3), *Limitation Act 2005 (WA)*, Act No. 19 of 2005.

⁹⁷ *Ibid* at section 15. Initially two alternative limitation periods were discussed for - 6 months since the person alleged to be defamed became aware of the publication or 6 years since the publication whichever occurs first.

⁹⁸ Section 28, *Limitation Act 2005 (WA)*, Act No. 19 of 2005. This does not apply if a longer limitation period is prescribed by another enactment. It is also subject to sections 86 and 87 of the Act.

⁹⁹ *Ibid* at section 17.

¹⁰⁰ *Ibid* at section 14(1).

¹⁰¹ *Ibid* at section 14(2).

¹⁰² *Ibid* at section 16. This also applies to civil actions for assault, battery or imprisonment.

¹⁰³ *Ibid* at section 18.

	Actions to recover land	Date of accrual ¹⁰⁴
	Actions to recover possession from a mortgagor	Date of accrual ¹⁰⁵
	Actions for foreclosure	Date of accrual ¹⁰⁶

3.43 The date of accrual of a cause of action, with is governed by Part 4 of the Act,¹⁰⁷ still differs for different causes of action. Different rules apply depending on the nature of the cause of action. The concerns outlined in the Western Australia LRC's Report with respect to the lack of uniformity between the limitation periods therefore remains to be addressed.

(3) England and Wales

3.44 The Law Commission for England and Wales published a Consultation Paper in 1998 and a Report in 2001, on the subject of the *Limitation of Actions*.¹⁰⁸ The Law Commission found that this area of law requires simplification and rationalisation because it is "uneven, uncertain and unnecessarily complex".¹⁰⁹ Further, as it stands, this area of law lacks coherence owing to its *ad hoc* development over a long period of time, is unfair and outdated, and lacks relevance for modern life.¹¹⁰ The Law Commission therefore found the case for a wide-ranging reform to be compelling, and

¹⁰⁴ Section 19, *Limitation Act 2005* (WA), Act No. 19 of 2005. This does not apply to actions by or on behalf of the Crown.

¹⁰⁵ *Ibid* at section 23.

¹⁰⁶ *Ibid* at sections 55-73.

¹⁰⁷ *Ibid* at section 17.

¹⁰⁸ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998); *Limitation of Actions* (Report No. 270, 2001). This was in accordance with the Law Commission's Sixth Programme of Law Reform (Law Com. No. 234).

¹⁰⁹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 1.

¹¹⁰ *Ibid* at 2-3.

recommended the introduction of “a law of limitations that is coherent, certain, clear, just, modern and cost-effective.”¹¹¹

3.45 The central features of the recommended core limitations regime are as follows:

PROPOSED CORE REGIME: LAW COMMISSION FOR ENGLAND AND WALES	
<i>BLP</i>	3 years running from the “date of knowledge” ¹¹²
<i>ULP</i>	10 years running from accrual or, for certain claims, ¹¹³ the date of the act or omission giving rise to the cause of action. No ULP for personal / fatal injuries actions. ¹¹⁴
<i>Application</i>	<ul style="list-style-type: none"> • The majority of tort claims; • Contract claims; • Restitutionary claims; • Claims for breach of trust & related claims; • Claims on a judgment; • Claims on an arbitration award; • Claims on a statute; • Equitable remedies for a cause of action, where the core regime would apply to common law remedies for that cause of action • Specified claims in company law.¹¹⁵
<i>Actions subject to</i>	<ul style="list-style-type: none"> • Certain tort actions;¹¹⁶

¹¹¹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 4.

¹¹² Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 41.

¹¹³ I.e. claims in tort where loss or damage is an essential element of the cause of action, and claims for breach of statutory duty.

¹¹⁴ See *Limitation of Actions* (Report No. 270, 2001) at paragraphs 3.99 – 3.113.

¹¹⁵ See section 459, *Companies Act 1985* (c. 6): an application by a member of a company by petition for an order that the company’s affairs were conducted in a manner that is unfairly prejudicial to the interests of the company’s member.

¹¹⁶ Including negligence, trespass to the person (including child abuse), defamation, malicious falsehood.

<i>modified regimes</i>	<ul style="list-style-type: none"> • Personal / fatal injuries actions; • Defective products actions; • Actions to recover land & related actions;¹¹⁷ • Actions surviving for the benefit of the estate of a deceased person; • Claims by a subsequent owner of damaged property; • Claims for conversion; • Claims in relation to mortgages and charges; • Claims in respect of companies and insolvency.
<i>Judicial Discretion</i>	Personal Injuries actions only. ¹¹⁸

3.46 The Government accepted the Law Commission’s recommendations in principle in 2002.¹¹⁹ In 2003, the Court of Appeal warmly recommended the recommendations, noting as follows:

“Early statutory implementation of it would obviate much arid and highly wasteful litigation, turning on a distinction of no apparent principle or other merit.”¹²⁰

3.47 The Court of Appeal again noted in 2006 that the Report “has been in Parliament’s hands for nearly five years following a comprehensive law reform study conducted at considerable public expense.” The Court asserted that:-

“[J]ustice would be far more simply achieved in claims like this in future if Parliament were to simplify the law along the lines the Commission recommended. In the meantime, the House of Lords itself may be able to remedy some of the very serious deficiencies and incoherencies in the law as it stands today in a way that we cannot.”¹²¹

3.48 In 2007, the Ministry of Justice stated that the Government would public proposals for consultation as soon as such a detailed examination of the

¹¹⁷ It was recommended that such actions should be subject to a limitation period of the same length as the ultimate limitation period (i.e. 10 years), running from the date of accrual.

¹¹⁸ See Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 90-94.

¹¹⁹ Hansard, HL Debates, 16 July 2002, col WA127.

¹²⁰ *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, 1480 (CA).

¹²¹ *A v Hoare* [2006] 1 WLR 2320, 2327 (CA) at paragraph 6.

impact of the proposals was complete.¹²² A Draft Legislative Programme published in May 2008 announced that one of four bills being considered for publication in draft in 2008-2009 was a “civil law reform bill – to implement reforms to the law relating to damages, limitation periods, claims against insurers by people other than the insured person, trusts in relation to the rules against perpetuities and excessive accumulations and the operation of the forfeiture rule in the law of succession.”¹²³ In October 2008 the Secretary of State for Justice stated that preparations were ongoing for a consultation on a draft bill to implement the Law Commissions’ recommendations to reform the law of limitation. She said that the consultation would take full account of the ruling of the House of Lords in *A v Hoare*, including the exercise of the court’s discretion to extend the limitation period and the way in which the claimant’s date of knowledge is defined in abuse cases.¹²⁴ In December 2008 it was announced that a number of Bills including a *Civil Law Reform Bill* would be published in draft form in 2009 before being introduced in Parliament as a formal Bill. This format is used to enable consultation and pre-legislative scrutiny before a Bill is issued formally. At the date of publication of this Paper the draft Bill has not yet been published but the Office of the Leader of the House of Commons has announced that when published the draft *Civil Law Reform Bill* will include proposals for the reform of the *Limitation Act 1980*.¹²⁵ In July 2009 the Ministry of Justice announced that the Bill would be published in draft form by the end of 2009.¹²⁶

3.49 Leading authors have suggested that in many ways, the proposals put forward by the Law Commission represent an improvement on and simplification of the present law, in line with modern trends. Moreover, it is suggested that the proposed reforms will help to resolve cases more quickly.¹²⁷

(4) New Zealand

3.50 Like the Irish *Statute of Limitations 1957*, the New Zealand *Limitation Act 1950* is largely based on the Wright Committee’s Report of 1936 and the

¹²² Written Answer, *Hansard* (HC), 23 October 2007, col 293W. It was stated that this was expected in early 2008.

¹²³ See *Preparing Britain for the Future - the Government’s Draft Legislative Programme 2008-2009* (14 May 2008, Cm 7372). Available at <http://www.official-documents.gov.uk/document/cm73/7372/7372.asp>.

¹²⁴ Written Answer, *Hansard* (HC), 6 October 2008, col 177W.

¹²⁵ See <http://www.commonleader.gov.uk/output/page2672.asp>.

¹²⁶ See <http://www.justice.gov.uk/news/newsrelease010709a.htm>.

¹²⁷ See e.g. McGee *Limitation Periods* (5th ed, 2006) at 26.

English *Limitation Act 1939*. The New Zealand Law Commission (“NZLC”) considers the 1950 Act to be “incomplete, misleading, and inaccessible”, and has asserted that “piecemeal attempts” by the Courts to cure its difficulties have resulted in a “lack of harmony.”¹²⁸ The New Zealand judiciary also considers the Act to be unfit for purpose and in need of a complete overhaul.¹²⁹

3.51 The idea of a core regime was first recommended in a report of the NZLC of 1988.¹³⁰ That recommendation was not acted upon. By the time of publication of a second report in 2000, the problems of the existing law had worsened, and so the NZLC confined its recommendations to urgently needed changes expressed as amendments to the existing *Limitation Act 1950*.¹³¹ In 2007, the Government of New Zealand indicated that it wished to advance legislation on the limitation of actions. The NZLC therefore commissioned an *Update Report*, which reviewed the 1988 and 2000 Reports and drew attention to subsequent developments in limitation law.¹³² The *Update Report* stressed that amendment of the existing legislation was insufficient, and that a modern and more accessible limitation statute was required.¹³³ The *Update Report* recommended the introduction a new Act of wide application. It was made available to the Ministry of Justice to assist in settling the policy.

3.52 Thereafter, the NZLC produced a consultation draft of a *Limitation Defence Bill*, which it published in December, 2007.¹³⁴

¹²⁸ New Zealand Law Commission *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 2.

¹²⁹ See *Trustees Executors Ltd v Peter James Murray & Ors* [2007] NZSC 27: “It is notorious that the New Zealand law concerning limitations is long overdue for reconsideration” (Blanchard J).

¹³⁰ New Zealand Law Commission *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988). This Report recommended the complete repeal of the Limitations Act 1950 and its replacement by a new statute containing different rules and employing a different vocabulary.

¹³¹ New Zealand Law Commission *Report 61, Tidying the Limitation Act* (NZLC R61, July 2000). See also New Zealand Law Commission *Preliminary Paper 69, Limitation of Civil Action – A Discussion Paper* (NZLC PP39, February 2000).

¹³² Christopher Corry BL *Miscellaneous Paper No. 16, Limitation Defences in Civil Cases: Update Report for the Commission* (NZLC MP 16, June 20 2007).

¹³³ See New Zealand Law Commission *Regulatory Impact Statement*, in *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 26.

¹³⁴ New Zealand Law Commission *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

(a) Consultation Draft 2007

3.53 The Bill reflects the recommendations made by the Commission in its previous papers in 1988 and 2000, and in the *Update Report* of 2007. If enacted, the Bill will replace the *Limitation Act 1950* with a clearer, more accessible limitation regime, with the following central features:

PROPOSED CORE REGIME: NEW ZEALAND	
<i>BLP</i>	6 years ¹³⁵ running from the date of the act or omission giving rise to the cause of action, subject to extension upon discoverability principles.
<i>ULP</i>	15 years from date of the act or omission giving rise to the cause of action.
<i>Exceptions</i>	<ul style="list-style-type: none">• Actions in respect of abuse or bodily injury.¹³⁶• Certain actions to recover land.¹³⁷• Actions for specific performance of a contract, injunctions or equitable relief.¹³⁸• Other limitation enactments.¹³⁹
<i>Judicial Discretion</i>	Available for claims in respect of bodily injury ¹⁴⁰
<i>Special Features</i>	<ul style="list-style-type: none">• List of “qualifying claims” in a “claims table”¹⁴¹• Applies to claims for public law damages.¹⁴²

3.54 The regime is intended to apply to the Crown and individuals alike,¹⁴³ to specified land actions,¹⁴⁴ and to arbitrations.¹⁴⁵ Special rules are provided for successive conversions and wrongful detention of goods.¹⁴⁶

¹³⁵ The original recommendation was for a three-year limitation period. See *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988), at paragraph 128.

¹³⁶ These are subject to a two year limitation period, extendable under clause 12, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹³⁷ Clause 33, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). See also Clause 37 of the Draft.

¹³⁸ Clauses 34 and 35, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). See further sections 4(9) and 31, *New Zealand Limitation Act 1950*.

¹³⁹ Clause 32, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). This clause is similar to section 33 of the *New Zealand Limitation Act 1950*.

¹⁴⁰ Clause 12, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹⁴¹ *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 41 *et seq.*

¹⁴² As defined in clause 10, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

3.55 In 2007, the NZLC asserted that the simplified and modernised *Limitation Defences Bill* would “reduce the costs and risks of injustice associated with litigation that are caused by the use of stale evidence to determine disputes” and “encourage claimants to act diligently, consequently protecting the quality of the evidence and reducing the potential for injustices to occur.”¹⁴⁷

(b) Special Feature: Claims Table

3.56 The proposed core regime applies to “qualifying claims” that are listed in Column 1 of the “Claims Table” contained in the first Schedule to the draft Bill.¹⁴⁸ There are three categories of qualifying claim, categorised by the following:

- a) The underlying act or omission of the claim or its effects;
- b) The legal description of the claim;
- c) The relief sought.¹⁴⁹

3.57 All qualifying claims have a “primary” limitation period. The duration of the primary periods applicable to the qualifying claim varies according to differences in the claims. Most primary periods are of 6 years’ duration. Defendants can establish that the claim is out of time (the “primary defence”) by proving that the date on which the claim was filed is after the last day of the primary period for the claim.¹⁵⁰ The Claims Table set out in Schedule 1 to the Bill consists of the following six columns:

¹⁴³ Clause 36, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹⁴⁴ Land of the Crown, Maori customary land, and land actions under the *Land Transfer Act 1952*. Clause 37, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹⁴⁵ Clause 39, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹⁴⁶ *Ibid* at clause 31. See clause 9 for an overview of this defence.

¹⁴⁷ New Zealand Law Commission *Regulatory Impact Statement*, in *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 27.

¹⁴⁸ Clause 5 and Schedule 1, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

¹⁴⁹ See New Zealand Law Commission *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 41 *et seq.*

¹⁵⁰ Clause 11, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

Kind of Claim	BLP: Start Date	BLP Duration	Late Knowledge Extension	ULP: Start Date	ULP: Duration
e.g. Tort	Date of act or omission	6 years	3 years	Date of act or omission	15 years

3.58 The rules applicable to the Claims Table are set out in the draft Bill.¹⁵¹

(c) *Limitation Bill 33-1 (2009)*

3.59 Submissions on the consultation draft raised significant issues and the Law Commission responded in 2008 by convening a working group of key submitters and stakeholders to review the exposure draft and identify and address technical issues. The working group's review resulted in the proposed new rules being restructured, refined, and made simpler and clearer. In November 2008 a redraft of the Bill was completed. The Bill was considered by the Government for inclusion on the 2009 Legislative Programme. In 2009 the Government published *Limitation Bill 33-1 (2009)* which is intended to come into force on 1 July 2009. The Bill is said to embody the Law Commission's recommendations based on the further work of the Reference Group.¹⁵² It will repeal and replace the *Limitation Act 1950*. Its purpose is stated as being "to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims."¹⁵³

3.60 Part 1 of the Bill deals generally with "money claims" while certain specified non-money claims are dealt with separately. "Money claims" include any claim for monetary relief at common law, in equity or under an enactment. This is a broad definition but the Bill specifically excludes certain claims from its ambit. The Bill provides civil limitation "defences" to certain claims, including claims in respect of land or goods. The Bill adopts as the starting date for the primary limitation period for most claims the date of the act or omission on which the claim is based. This is because the date of accrual was accepted to be sometimes difficult to identify.¹⁵⁴ Special starting dates are provided for

¹⁵¹ *Ibid* at clause 5(4).

¹⁵² See Explanatory Note, *Limitation Bill 33-1 (2009)*, available at http://www.legislation.govt.nz/bill/government/2009/0033-1/latest/DLM2033101.html?search=ts_bill_Limitation_resel&sr=1.

¹⁵³ See clause 3, *Limitation Bill 33-1 (2009)*.

¹⁵⁴ See *Thom v Davys Burton* [2008] NZFLR 1032 (SC).

certain actions such as land actions, claims under the *Contracts (Privity) Act 1982* and actions in respect of personal property, accounts, wills, contribution and judgments or awards.¹⁵⁵

3.61 A general, six year limitation period applies to most claims under the Bill, while general provisions cover minority, incapacity, acknowledgement or part-payment, and fraud.¹⁵⁶ The courts will have a discretion to provide relief in child sexual abuse claims and a discretion to extend limitation periods in cases of incapacity (for example, incapacity arising at or towards the end of a limitation period).¹⁵⁷

3.62 A three-year “late knowledge” test will apply to money claims and certain other claims. This replaces the concept of “reasonable discoverability”. The plaintiff’s “late knowledge date” is the date (after the close of the start date of the claim’s primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of specified key facts that the claimant must know in order to make the claim. The Bill provides that a claimant does not have “late knowledge” of a claim unless it is proven that, at the close of the start date of the basic limitation period, the claimant neither knew, nor ought reasonably have known, all of the specified key facts. It also clarifies that the absence of actual or constructive knowledge may be attributable to a mistake of fact or a mistake of law other than a mistake of law as to the effect of the Bill itself.¹⁵⁸

3.63 A 15 year long stop or ultimate limitation period will prevent such claims being taken indefinitely; that period will run from the date of the act or omission giving rise to the cause of action. Defamation cases are subject to a two-year limitation period; the Bill does not re-enact the current provision that allows a court to permit relief on a defamation claim commenced within six years of the date of accrual. The date of knowledge test will apply, however, where the defamation action is a money claim.¹⁵⁹

E Conclusion and Provisional Recommendation

3.64 Based on the comparative analysis in this Chapter, the Commission considers that a root-and-branch reform is needed so as to simplify the law, create uniformity between the rules governing the limitation of various causes of action, and to remedy any anomalies existing in the present law. The

¹⁵⁵ Clauses 17-35, *Limitation Bill 33-1* (2009).

¹⁵⁶ *Ibid* at clauses 42-47.

¹⁵⁷ See Explanatory Memo.

¹⁵⁸ Clause 13, *Limitation Bill 33-1* (2009).

¹⁵⁹ *Ibid* at clause 14.

Commission accordingly has concluded that it is appropriate to introduce new “core regime” legislation governing limitation of actions, based on a set of limitation periods that would apply to various civil actions and which would remedy a number of anomalies in the current law. The Commission also provisionally recommends that the new legislation governing limitation of actions should apply to the majority of civil actions, with limited exceptions which would provide for special limitation periods.

3.65 The Commission provisionally recommends the introduction of new “core regime” legislation governing limitation of actions, based on a set of limitation periods that would apply to various civil actions and which would remedy a number of anomalies in the current law. The Commission also provisionally recommends that the new legislation governing limitation of actions should apply to the majority of civil actions, with limited exceptions which would provide for special limitation periods.

CHAPTER 4 A UNIFORM BASIC LIMITATION PERIOD?

A Introduction

4.01 This Chapter addresses the nature of the basic limitation period,¹ and makes proposals as to the appropriate length of a uniform basic limitation period, and the date from which it should run.

4.02 In Part B, the Commission examines three trends in the reform of basic limitation periods: (a) reduction of the number of different limitation periods applicable; (b) introduction of “catch all” basic limitation periods; and (c) Introduction of uniform basic limitation periods. The Commission concludes that a uniform basic limitation period be introduced. In Part C, the Commission examines the duration of the basic limitation period, bearing in mind that the duration of the various limitation periods that apply at present has been described as a matter of historical accident. The Commission provisionally recommends that a choice be made between two suggested options in this respect: either one basic limitation period of two years; or three basic limitation periods of one, two and six years. In Part D, the Commission examines the method by which the basic limitation period would run, preferring a date of knowledge test.

B Trends in the reform of basic limitation periods

4.03 There have, since the early 20th century, been three clear trends in the reform of basic limitation periods:

- (i) Reduction of the number of different limitation periods applicable;
- (ii) Introduction of “catch all” basic limitation periods; and
- (iii) Introduction of uniform basic limitation periods.

(1) *Reduction of the Range of Different Limitation Periods*

4.04 Difficulties arise where large numbers of limitation periods of different lengths apply to different causes of action. As far back as 1937, the Law Revision Committee in England (“the Wright Committee”) suggested that the

¹ This limitation period is commonly referred to as the ‘standard’, ‘primary’ or ‘initial’ limitation period. For the purposes of this Consultation Paper, the Commission will use the term ‘basic’ limitation period.

reduction of the number of different limitation periods would result in the simplification of limitations law.² The Committee did not feel able to recommend the reduction of all limitation periods to a single period as it considered that there were reasons - particularly in an accrual-based system - why the limitation period should be shorter for some causes of action than for others.³ Nevertheless, it recommended the abolition of the distinctions between the limitation periods applicable to different torts, and the introduction of one primary limitation period of six years for all actions founded in tort or simple contract, and a variety of other actions.⁴ This recommendation was enacted in section 2 of the English *Limitation Act 1939*, which has, for the most part, been re-enacted under the English *Limitation Act 1980*.

4.05 The idea of a uniform limitation period for tort and simple contract matters has since been implemented in other common law jurisdictions, including Ireland.⁵ There has also been a corresponding reduction, across various jurisdictions, in the number of limitation periods applicable to various actions. In general, however, despite the increasing homogeneity of the limitation periods applicable to various actions, separate limitation periods have been maintained for a wide range of different actions, in particular for actions of equitable origin such as actions for breach of trust, actions for the recovery of land, and actions enforcing the obligations created by a mortgage.

4.06 A further general trend has been the introduction of shorter limitation periods for actions in respect of personal injuries, defamation, latent defects and latent property damage. This reflects the fact that improved communications and information flows enable plaintiffs to discover the existence of causes of action more readily than was previously the case.⁶ This trend has further complicated limitations law and has added to - rather than reduced - problems associated with different dates of accrual and with the classification of actions. In this way, although attempts have been made to reduce the number of limitation periods, modern limitation statutes, including the *Statute of Limitations 1957*, continue to contain a large number of different limitation periods applicable to different forms of action.

² See e.g. Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at paragraph 5.

³ *Ibid* at paragraph 5.

⁴ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936), at paragraph 5.

⁵ See e.g. section 11(2), *Statute of Limitations 1957*.

⁶ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 283.

(2) “Catch-All” Limitation Periods

4.07 A further trend across various jurisdictions has been the introduction of “catch-all” limitation periods. “Catch-all” limitation periods apply to forms of action that are not otherwise covered by a limitation period specified within a statute of limitations. Such provisions make it unnecessary to specify limitation periods for contract, tort and various other actions for which specific limitation periods are generally provided by other limitation acts.⁷ This guarantees comprehensiveness and reduces the number of categories based on problematic characterisations.⁸

4.08 “Catch-all” limitation periods were not a feature of statutes of limitation until 1931, when the Uniform Law Conference of Canada’s *Uniform Limitation of Actions Act* incorporated such a provision.⁹ This was widely adopted by the various Canadian jurisdictions¹⁰ and analogous provisions were introduced outside of Canada soon afterwards. ‘Catch-all’ provisions are not currently a feature of Irish limitations law.

(3) Uniform Basic Limitation Periods

4.09 The reduction of the number of limitation periods and the introduction “catch-all” limitation periods have culminated in a new trend - the recommendation and / or introduction of a single “basic” or “primary” limitation period (for example two, three or six years) applicable to a wide range of civil actions without distinction, subject only to limited exceptions.

4.10 As seen above, the idea of a uniform basic limitation period first emerged from research published by the Alberta Institute of Law Research and Reform in 1986. The Institute concluded that “there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claim.”¹¹ It noted that the practice of

⁷ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997), at paragraph 4.47.

⁸ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 81.

⁹ Section 2(1)(j), *Uniform Limitation of Actions Act 1931* (Uniform Law Conference of Canada): “any other action not in this Act or any other Act specifically provided for, within six years after the cause of action arose.”

¹⁰ The *Uniform Limitation of Actions Act* formed the basis for legislation in Alberta, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon Territory.

¹¹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No 4 1986) at paragraph 2.63.

applying different, fixed limitation periods to different causes of action is based on the argument that there is a period during which the plaintiff usually discovers the existence of the cause of action, that some claims are of greater economic importance than others, that some claims are less likely to be disputed than others, and that evidence deteriorates more quickly in some situations than others. The Institute firmly rejected these arguments.¹²

4.11 Though not without its difficulties, the spotlight of recent reform proposals has shone on the idea of a streamlined, simplified limitation system. No jurisdiction has yet managed to reduce all of its limitation periods to one set period of duration, but many have accepted arguments for eliminating longer limitation periods (for example for deeds, judgments etc) and applying the same period to the great majority of claims.¹³ Even in light of a desire for simplicity, some categorisation may be inevitable if a limitation scheme is to deal fairly with all the issues that arise.

4.12 The Law Commission for England and Wales has endorsed the introduction of a uniform basic limitation period, noting that the different limitation periods that exist at present “cannot be defended and are products of the ad hoc development of the law of limitations.”¹⁴ The Law Commission noted that a uniform limitation period would have the advantage of increasing the coherence of the law on limitation and making it more accessible (both to lawyers and the public).¹⁵

(4) Provisional Recommendation

4.13 *The Commission provisionally recommends the introduction of a uniform basic limitation period of general application, which would apply to a wide range of civil actions, subject to a limited number of exceptions.*

C Length of the Uniform Basic Limitation Period

4.14 The duration of the various limitation periods that apply at present has been described as “a matter of historical accident”.¹⁶ To some extent, the selection of the duration of a limitation period is always an arbitrary decision.

¹² *Ibid* at paragraphs 2.54-2.63.

¹³ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997), at paragraph 7.10 (general); 12.8-12.12 (deeds), 12.38-12.43 (actions on a judgment).

¹⁴ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 281.

¹⁵ *Ibid* at 281.

¹⁶ Dockray “Why do we need Adverse Possession” [1985] Conv 272.

There is no way to strike the appropriate balance between the competing interests with scientific accuracy. A limitations system will never operate perfectly and will inevitably produce injustice on occasion. Nevertheless, it is clear that there are certain matters for which time must be allowed.

4.15 The length of the basic limitation period must take account of the need to do justice to the plaintiff and to the defendant. The following imperative has been expressed by the Alberta Institute:-

“Although a limitations system should prevent a claimant from bringing a claim unduly late, it should not require him to bring one with undue haste.”¹⁷

4.16 The Law Commission for England and Wales has summarised the relevant considerations as follows:-

“The limitation period chosen needs to provide sufficient time for claimants to consider their position once the facts are known, take legal advice, investigate the claim and negotiate a settlement with the defendant, where this is possible. At the same time it should not be so long that the claimant is able to delay unreasonably in issuing proceedings.”¹⁸

4.17 The Law Commission has expressed the view that the chosen duration of the basic limitation period should allow the plaintiff sufficient time to start preparing the case, but should not allow all the time which may be necessary to draft the pleadings required in the action. Regard must also be had to the complexities involved in preparing different actions, from straightforward road traffic accident claims to complex contractual claims.¹⁹

4.18 Guidance may be gleaned from the practice of various other jurisdictions to recommend and / or introduce uniform basic limitation periods:

¹⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.58.

¹⁸ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 66.

¹⁹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 282.

Uniform Basic Limitation Periods		Running from:
Alberta	2 years	Discoverability
England and Wales (LC)	3 years	Discoverability
Ontario	2 years	Discoverability
Saskatchewan	2 years	Discoverability
ULCC	2 years	Discoverability
Western Australia	3 years	Discoverability
New Zealand (LC)	6 years	Date of the act or omission, or “reasonable discoverability” ²⁰

4.19 Clearly, there is a trend towards adopting a short limitation period running from discoverability. Each of these basic limitation periods apply to a wide range of civil actions, and are subject to few, limited exceptions.

(1) One Year?

4.20 A twelve-month fixed limitation period, running from discoverability, was introduced in England in 1963 for personal injuries actions.²¹ This period was considered very short for the plaintiff to carry out the usual investigations, obtain legal advice, negotiate and settlement, apply to a judge for leave to issue the writ, and to finally initiate proceedings.²² The limitation period was extended following a Law Commission Report in 1970,²³ to allow an action to be brought within three years of the “date of knowledge” and a similar period was allowed for claims arising out of the injured person’s death, with additional reference to the claimant’s date of knowledge.²⁴

²⁰ This has been changed under clause 13, *Limitations Bill 33-1 (2009)*.

²¹ *Limitation Act 1963*.

²² Law Reform Committee *Twentieth Report: Interim Report on Limitation of Actions in Personal Injury Claims* (Cmnd. 5630, 1974) at paragraph 15.

²³ Law Commission for England and Wales *Report on the Limitation Act 1963* (Law Com No. 35, 1970).

²⁴ Section 1, *English Law Reform (Miscellaneous Provisions) Act 1971*.

4.21 The Alberta Institute was not in favour of the introduction of a 12-month uniform basic limitation period on the following basis:

“We agree that a claimant who acts promptly should be able to bring a claim within 12 months after discovery. However, we do not believe that a 12-month limitation period beginning with discovery will give the parties an adequate period of time in which to attempt to settle their differences without litigation. A limitation period threatening such an immediate bar could encourage the hasty commencement of litigation which, with more time available, might be compromised.”²⁵

4.22 The Institute reiterated that although limitation systems are designed to encourage the early litigation of controversies that must, unfortunately, be litigated, limitation systems are *not* designed to encourage litigation.²⁶

4.23 A one-year limitation period has been introduced in England and Wales and across Australia for defamation and malicious falsehood actions. This is subject to the courts’ discretion to extend or dis-apply the one-year period, however, where the justice of the case so requires. The *Defamation Act 2009* provides for a one year period in Ireland, again subject to judicial discretion. This has been discussed in Chapter 2, above.

4.24 The proposed introduction of a one-year period for personal injuries actions, which was floated during the drafting of the *Courts and Civil Liability Bill*, was not generally welcomed. The Committee on Court Practice and Procedures indicated that the introduction of such a short limitation period could give rise to significant practice difficulties and may result in inconsistencies - particularly having regard to the limitation period applicable to personal injuries actions made against the estate of deceased persons.²⁷ The Committee more recently acknowledged that defamation is a case apart insofar as in the majority of cases, the damage done to reputation by libel is more or less instantaneous.²⁸

²⁵ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.143.

²⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.143.

²⁷ See Committee on Court Practice and Procedure *Commentary on the General Scheme of the Courts and Civil Liability Bill* (6 November 2003).

²⁸ Committee on Court Practice and Procedure *29th Report: Personal Injuries Litigation* (June 2004).

(2) Two Years?

4.25 A two-year limitation period now applies to a variety of different actions in Ireland. In *O'Brien v Manufacturing Engineering Co. Ltd*,²⁹ the Supreme Court held:-

“In the view of the Court a period of 12 months or, where there are substantial grounds for not initiating within 12 months, a period of 24 months is not unreasonably short to enable a person not suffering from any disability to ascertain whether or not he has a common-law action and to institute that action.”³⁰

4.26 This decision left the impression that the constitutionality of the provision might fail should disability provisions not apply. Nevertheless, in *Moynihán v Greensmyth*,³¹ the Supreme Court upheld the constitutionality of the two-year limitation period applicable to actions against the estate of a deceased person under section 9(2) of the *Civil Liability Act 1961*, even where disability provisions did not apply.

4.27 The Alberta Institute recommended the introduction of a two-year basic limitation period, running from the date of discoverability, supplemented by an ultimate limitation period of ten years, running from the date of accrual. The Institute was of the view that for the great majority of claims, the basic limitation period would expire first, and that the ultimate limitation period would not strike down many claims.³²

4.28 The Committee on Court Practice and Procedure recently stated that the reduction of the limitation period for personal injuries actions from three years to two is “consistent with the desired objective of developing an efficient and effective system of personal injuries claims determination”.³³

(3) Three Years?

4.29 A three-year limitation period was introduced for personal injuries actions in England and Wales following the reports of the Monckton Committee

²⁹ [1973] IR 334 (SC). In this case, the Court was considering the two-year limitation period applicable under section 6(1) of the *Workmen's Compensation (Amendment) Act 1953*.

³⁰ *O'Brien v Manufacturing Engineering Co. Ltd* [1973] IR 334, 366-367 (SC).

³¹ [1977] IR 55.

³² Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 141.

³³ Committee on Court Practice and Procedure *29th Report: Personal Injuries Litigation* (June, 2004).

in 1946³⁴ and the Tucker Committee in 1949.³⁵ The three-year period was chosen as something of a compromise between the six-year period generally applicable to tort claims, and the one-year limitation period applicable to claims against public authorities.

4.30 Although, the Alberta Institute ultimately recommended a two-year basic limitation period, it also expressed the view that “a three-year discovery period is reasonable.”³⁶

4.31 During the consultation phase of a recent review of the three-year limitation period applicable to personal injuries actions in Scotland, the Scottish Law Commission found that the majority of consultees did not think there were significant problems with the limitation period. Certain consultees did, however, express the view that the three-year limitation period was inappropriate for claims in respect of occupational diseases as greater investigatory work was required in such cases.³⁷ The Law Commission was of the view, however, that it would not be advisable to treat certain categories of personal injury claim differently to others, as this would create further, unwarranted distinctions in the law of limitation. It therefore recommended that the limitation period for personal injury actions should be raised to five years.³⁸ The Law Commission noted that the changing nature of personal injury litigation practice - resulting primarily from the marked decline in the number of persons employed in heavy industry – meant that expert reports are more frequently required in order to establish liability. It was agreed that this represented a good argument for lengthening the limitation period for personal injuries actions.³⁹

4.32 The Law Commission for England and Wales has noted that a three-year limitation period - currently applicable in that jurisdiction to personal injuries, latent damage and defective products actions - has the benefit of familiarity and that there is “little evidence to suggest that a three-year limitation

³⁴ Final Report of the Departmental Committee on *Alternative Remedies* (Cmd. 6860, 1946).

³⁵ Report of the Committee on the *Limitation of Actions* (Cmd. 7740, 1949). The Tucker Committee in fact recommended a two-year limitation period, extendable at the discretion of the court to six years.

³⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at paragraph 2.144

³⁷ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207) at 29.

³⁸ *Ibid* at 30.

³⁹ *Ibid* at 28.

period running from discoverability would not be sufficient for all contract and tort claims.⁴⁰ The Law Commission acknowledged that a reduction from six to three years for contract claims would be “a substantial reduction”, even though the additional change of starting date to discoverability would give a minority of plaintiffs a longer period than is now available to prepare the claim.⁴¹

4.33 Roughly 60% of the Law Commission’s consultees supported the introduction of a three-year basic limitation period. The Law Commission noted that experience in that jurisdiction suggests that “the three year period provides sufficient time for the claimant to bring a claim in the vast majority of cases.”⁴² It recognised, however, that a three-year period would create problems for patent claims in relation to patents granted in the European Patent Office, but it proposed solutions for the problems that might be encountered, and found that “[t]his alone would not therefore appear to be sufficient reason to choose a longer limitation period.”⁴³

(4) Four Years?

4.34 The United Nations Commission on International Trade Law adopted a *Convention on Limitation in the International Sale of Goods* in 1974.⁴⁴ The aims thereof have been expressed as follows:-

“The basic aims of the limitation period are to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty and injustice that would result if a party were to remain exposed to unasserted claims for an extensive period of time.”⁴⁵

⁴⁰ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 283.

⁴¹ *Ibid* at 283-284.

⁴² Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 66.

⁴³ *Ibid* at 66

⁴⁴ The Convention was amended by a Protocol in 1980 by the diplomatic conference that adopted the UN Convention on Contracts for the International Sale of Goods, in order to harmonise the two Conventions. The amended Convention entered into force on 1 August 1988.

⁴⁵ Explanatory Note by the UNCITRAL Secretariat on the Convention, available at <http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf>. The Note was prepared for informational purposes and is not an official commentary.

4.35 The Convention sets a uniform limitation period of four years, within which a party to a contract for the international sales of goods must commence legal proceedings against another party in order to assert a claim arising from the contract or relating to its breach, termination or invalidity.⁴⁶ The choice of a four-year period has been explained as follows:-

“A limitation period of four years' duration was thought to accomplish the aims of the limitation period and yet to provide an adequate period of time to enable a party to an international sales contract to assert his claim against the other party.”⁴⁷

4.36 The limitation period was decided upon after questionnaires were completed by various governments and interested international organisations. The Official Commentary on the Convention, prepared by the UN Office of Legal Affairs in 1978, notes that various considerations were taken into account when establishing the length of the limitation period, including the following:-

“On the one hand, the limitation period must be adequate for the investigation of claims, negotiation for possible settlements making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration was given to the special problems resulting from the distance that often separates the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of uncertainty and injustice that would arise from the extended passage of time without the resolution of disputed claims.”⁴⁸

4.37 The Commentary continues as follows:-

“In the course of drafting this Convention, it was generally considered that a limitation period within the range of three to five years would be appropriate. The limitation period of four years established in [Article 8] is a product of compromise.”⁴⁹

4.38 The four year period runs from the date of accrual of the claim, as defined in the Convention.⁵⁰ The limitation period may be extended or

⁴⁶ Article 8, *Convention on the Limitation Period in the International Sale of Goods*.

⁴⁷ Explanatory Note by the UNCITRAL Secretariat on the Convention, available at <http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf>.

⁴⁸ *Commentary on the Convention on the Limitation Period in the International Sale of Goods, done at New York, 14 June 1974 (A/Conf.63/17)*, 27 June, 1978.

⁴⁹ *Ibid.*

⁵⁰ Articles 9 & 10, *Convention on Limitation in the International Sale of Goods*.

recommence in certain circumstances. For example, while it cannot be modified by agreement of the parties, it can be extended by a written declaration of the debtor during the running of the period. The contract of sale may stipulate a shorter period for the commencement of arbitral proceeding, if the stipulation is valid under the law applicable to the contract. The Convention establishes an overall time period of 10 years, from the date on which the limitation period originally commenced to run, beyond which no legal proceedings to assert the claim may be commenced under any circumstances.⁵¹ It has been explained that the theory behind that provision is that enabling proceedings to be brought after that time would be inconsistent with the aims of the Convention in providing a definite limitation period.⁵²

(5) Five Years?

4.39 In Scotland, the concepts of prescription and limitation are both used, prescription being a rule of substantive law, and limitation a procedural rule.⁵³ A five-year 'short negative prescription period' was introduced in 1973⁵⁴ for all categories of obligation to which the provision applies, including:

- Obligations to pay a sum of money due in respect of a particular period, including interest, the instalment of an annuity, rent or a periodic payment under a lease, and a periodic payment under a land obligation.
- Obligations arising from unjust enrichment or *negotiorum gestio*;
- Obligations arising from liability to make reparations;
- Obligations under bills of exchange and promissory notes;
- Obligations of accounting;
- Obligations arising out of any other contract;
- Actions for delict.⁵⁵

4.40 This 'short negative prescription' period does not apply to:

⁵¹ Article 23, *Convention on Limitation in the International Sale of Goods*.

⁵² Explanatory Note by the UNCITRAL Secretariat on the Convention, available at <http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf>.

⁵³ See further Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207) at 2.

⁵⁴ Following the Scottish Law Commission *Report on Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No. 15, 1970).

⁵⁵ Section 6 and Schedule 1, paragraph 1, *Prescription and Limitations (Scotland) Act 1973* (c. 52), as amended. Schedule 2 governs the running of time.

- (1) Obligations to make reparation for personal injury (a three-year period applies);⁵⁶
- (2) Actions for defamation (a three-year period applies);⁵⁷
- (3) Obligations to make reparations for damage caused by a defective product (a 10-year period applies);⁵⁸
- (4) Obligations to recognise an arbitration award, decree of court or order of tribunal;
- (5) Obligations arising from the issue of a bank note;
- (6) Obligations relating to land.⁵⁹

4.41 A long-negative prescription period of 20 years applies to most of the excepted causes of action.⁶⁰ The expiry of these prescription periods has the effect of extinguishing the plaintiff's claim entirely.⁶¹

(6) Six Years?

4.42 The six-year limitation period applicable to the majority of contract and tort actions under the *Statute of Limitations 1957* was first fixed by the English *Limitation Act 1623*. It has proved remarkably durable.⁶² In 1936, the Wright Committee recommended the adoption of a single, six-year limitation period for contract and tort actions, as this was "the period which at present

⁵⁶ See *ibid* at section 17(2), substituted by section 17, *Prescription and Limitation (Scotland) Act 1984* (c. 45).

⁵⁷ See section 18A, *Prescription and Limitations (Scotland) Act 1973* (c. 52), inserted by section 12, *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985* (c. 73).

⁵⁸ *Ibid* at section 22A, inserted by the *Consumer Protection Act 1987* (c. 43).

⁵⁹ *Ibid* at Schedule 3.

⁶⁰ *Ibid* at section 7. The Scottish Law Commission has recommended that this be shortened to 15 years in its *Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)* (Scot Law Com No. 122, 1989) at paragraphs 3.11-3.16.

⁶¹ Section 6(1), *Prescription and Limitations (Scotland) Act 1973* (c. 52).

⁶² Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 10.

applies to the majority of such actions and is familiar to the general public.”⁶³
This recommendation was enacted in the English *Limitation Act 1939*.

4.43 Almost four decades later, in 1977, the Law Reform Committee noted that the six year limitation period was “unnecessarily long”, particularly in the field of commerce. The Committee considered whether or not a period of four or five years should instead be adopted.⁶⁴ No shorter periods were assessed, as the Committee considered that this would cause problems unless the accrual rule was supplanted.⁶⁵ It recommended against changing the length of the primary limitation period, however, as the six-year period had become familiar to the general public as well as to lawyers, and should not be changed unless it could be shown that there was a substantial advantage to doing so.

4.44 The Alberta Institute in 1986 asserted that if a limitation period starts to run from accrual, six years duration may be required to allow the claimant to discover the claim, attempt to settle, and then assert his or her claim. The Institute did not consider a six-year limitation period justified, however, where the running of the limitation period is based on discovery.⁶⁶

4.45 In 1998, the Law Commission for England and Wales noted that it was unable to trace any information on the reason why the six-year limitation period was considered appropriate for most actions.⁶⁷ The Law Commission considered as follows:

“[I]t is fair to assume that [the six-year limitation period] reflected conditions that are no longer applicable (not least because of far more rapid methods of communication). Perhaps its durability reflects nothing more than lawyers’ familiarity with it.”⁶⁸

⁶³ Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936).

⁶⁴ Law Reform Committee *Twenty-First Report: Final Report on Limitation of Actions* (Cmnd. 6923, 1977) at paragraph 2.52.

⁶⁵ *Ibid* at paragraph 2.52.

⁶⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.149.

⁶⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 5.

⁶⁸ *Ibid* at 10-11.

4.46 The Law Commission asserted that “a limitation period of six years is too long (even where that period starts from the accrual of the cause of action)” and proposed the adoption of a shorter period.⁶⁹

(7) A variety of fixed Lengths: the British Columbia model

4.47 In British Columbia, the revised *Limitation Act* reduces to three the number of applicable limitation periods, grouped according to whether the limitation period would last for two, six or ten years.⁷⁰ The limitation period applicable in any given case depends on the type of action being brought. Causes of action are grouped according to functional terms, rather than technical classifications. The basic limitation periods run from the time at which the cause of action arises. A six-year limitation period applies to causes of action not specified in the Act.⁷¹ The revised Act also lists actions for which no limitation period applies, such as sexual abuse claims.⁷² These basic limitation periods are supplemented by two alternative ultimate limitation periods of 30 years and 6 years, running from the date on which the cause of action arises.⁷³

4.48 The Saskatchewan Law Reform Commission in 1989 emphasised the importance of adopting functional classifications, rather than adopting traditional distinctions such as that between contract and tort.⁷⁴ It made recommendations along the same lines as British Columbia had done but its recommendations have not been adopted. Instead, the legislature opted for a model along the lines of that recommended by the Alberta Institute, consisting of a two-year basic limitation period and a 15-year ultimate limitation period.⁷⁵

(8) Other Considerations

4.49 The appropriate length of the limitation period will depend on the date from which it begins to run, which is discussed in greater detail from page 191.

4.50 In its seminal report on limitations, the Alberta Institute noted that if a basic limitation period is lengthened in order to operate with greater fairness to

⁶⁹ *Ibid* at 283.

⁷⁰ Section 3, *Limitation Act* RSBC 1996, c.266. This was first introduced by section 3 of the *Limitation of Actions Act 1985*.

⁷¹ *Ibid* at section 3(5).

⁷² *Ibid* at section 3(4).

⁷³ *Ibid* at section 8(1).

⁷⁴ Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989) at 9-10.

⁷⁵ See *Limitations Act* SS 2005 c.L16-1, as amended by SS 2007, c.28.

claimants in atypical cases, it will give claimants in the typical cases an unnecessarily long period of time in which to bring claims, to the possible prejudice of defendants.⁷⁶ The Institute also observed that limitation periods that run from the date of discoverability may be shorter than limitation periods running from accrual, because there is no need to allow time for the plaintiff to discover the existence of the claim.⁷⁷

4.51 An alternative way of assessing how long a limitation period should last is to look at the economic implications of having a short limitation period. This of course involves an assessment of the costs and benefits of imposing a short limit on the period during which an action should be brought. One of the most obvious costs of having a short limitation period will be the loss to the claimant of the value of the remedy (often compensation) if the claim is not commenced on time. A further cost may be that a shorter limitation period will reduce the incentive for a (potential) defendant to perform his or her legal obligations given that a calculated risk might be taken that at least some claims will not be brought within the limitation period. The benefits of a shorter limitation period include reduced litigation costs, a reduction in the costs accruing to the defendant and possibly to third parties, and a potential reduction in social costs - this is relevant because the judicial process receives public subsidies.⁷⁸

(9) *Provisional Recommendation*

4.52 Bearing in mind the guiding principles set out earlier in this Paper, the Commission is of the view that it is important not to impose too short a limitation period, as meritorious claims could be statute-barred as a result. It is also mindful, however, that plaintiffs must be encouraged to bring proceedings with due expedition.

4.53 *The Commission provisionally recommends the introduction of either:*

- (a) one basic limitation period of general application, running for a period of two years; or*
- (b) three basic limitation periods of specific application, running from periods of one, two and six years respectively.*

⁷⁶ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986), at 71.

⁷⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986), at paragraph 2.147.

⁷⁸ See Anthony Ogus, *Limitation of Actions - Justified or Unjustified Complexities?* (Draft of Paper presented at the Amsterdam Centre for Law and Economics Seminar, 12 December 2005.)

4.54 *The Commission provisionally recommends that, subject to rules concerning the date from which the basic limitation period is to run, the introduction of a two-year limitation period would be sufficient for the majority of actions.*

D Running the Basic Limitation Period

4.55 As is clear from Chapter 2, the limitation periods contained in the *Statute of Limitations 1957* run from the date of accrual of the cause of action with few exceptions. Across the common law world, the date of accrual is slowly being abandoned as the favoured point from which limitations law runs. In Ireland the accrual test has been supplanted by discoverability principles in personal injuries actions,⁷⁹ wrongful death actions,⁸⁰ and defective products actions.⁸¹

4.56 The piecemeal approach to reform of the starting dates in Ireland and elsewhere has given rise to an unsatisfactory situation and runs contrary to the primary goal of a simplified, uniform limitation regime. It also perpetuates distinctions between different kinds of action which aggravates the problems caused by overlapping contract and tort liability, and the ensuing difficulties with the classification of actions for limitation purposes. The introduction of a consistent, readily-identifiable starting point for the running of the basic limitation period would alleviate many of these problems.

4.57 There are, in general, four possible dates from which a limitation period can run, namely:

1. Date of Accrual
2. Date of the Act or Omission giving rise to the cause of action
3. Date of Discoverability
4. Alternative starting dates (a combination of the above).

4.58 The Commission considers that first and foremost, the starting point for the running of a basic limitation period should be easy to identify. We have been greatly assisted by the assessment carried out by the Orr Committee in England as to the characteristic of the ideal starting point, which wielded the following conclusion:

⁷⁹ See *Statute of Limitations (Amendment) Act 1991*.

⁸⁰ See *Civil Liability Act 1961*.

⁸¹ See *Liability for Defective Products Act 1991*.

- i) It should be sufficiently near in time to the incidents giving rise to the claim to ensure that proceedings were instituted before the relevant evidence became either unobtainable or too stale to be reliable;
- ii) It should be unmistakable and readily ascertainable;
- iii) Its occurrence should necessarily become known forthwith to the plaintiff.⁸²

4.59 The Orr Committee acknowledged that no starting point could satisfy all these conditions in every case, and that the accrual test will normally satisfy requirements (a) and (b), but will often fail to satisfy (c).⁸³ On the other hand, the discoverability test will normally satisfy (c), but will sometimes fail to satisfy (a), and often (b).⁸⁴

4.60 There follows a discussion of each of the four possible starting dates.

(1) Date of Accrual

4.61 The traditional starting point for the running of limitation periods has been the 'date of accrual'. The *Statute of Limitations 1957* adheres to this tradition, although progress has been made in limited fields. The date of accrual is not defined by the *Statute*. Its definition is of judicial origin and can only be determined through an analysis of case law spanning more than a century. In general, it can be said that the limitation period runs from the date on which the cause of action is complete, when it becomes possible (at least in theory) to commence proceedings.⁸⁵ No action will accrue until every element of the cause of action is present, that is, every fact that it will be necessary for the plaintiff to prove in order to support his right of judgment to the court.⁸⁶

4.62 The accrual test is problematic for a variety of reasons. Different common law rules govern different causes of action. The cases dealing with accrual are numerous and complex, and frequently uncertain. Supplemental provisions governing the date of accrual, derived from judicial decision, are scattered throughout the *Statute of Limitations 1957*. The rules governing

⁸² Law Reform Committee of Parliament *Twenty-First Report: Final Report on Limitation of Actions* (Cmnd. 6923, 1977), at paragraph 2.1. See also paragraph 2.74.

⁸³ *Ibid* at paragraph 2.2.

⁸⁴ *Ibid* at paragraph 2.3.

⁸⁵ See e.g. *Reeves v Butcher* [1891] 2 QB 509, 511 (Lindley LJ): "the earliest time at which a claim could be brought".

⁸⁶ See *Read v Brown* (1888) 22 QBD 128, 131; *Coburn v Colledge* [1897] 1 QB 702, 706.

accrual are well known by lawyers, though they are complex. Finding the appropriate date is a difficult task for professionals versed in limitation law, and is more difficult still for non-lawyers.

4.63 While the common law principles governing accrual are generally well settled, the rules do not always make it possible to pinpoint the precise date from which the limitation period should run. This is the case, for example, in cases involving latent property damage, or economic loss. Moreover, where the rules governing accrual are seen to produce an injustice and deemed unsuitable, they may be subject to amendment by the judiciary or the legislature, which results in further uncertainty.⁸⁷

4.64 Additionally, problems arise from the categorisation of actions for the purpose of the accrual rules that will apply. This may be seen from the recent House of Lords decision in *A v Hoare* where the classification of an action in respect of child abuse was considered in the context of limitation.⁸⁸

4.65 Further difficulties arise where causes of action overlap, e.g. where a plaintiff has a claims founded in contract and tort. Here, the dates of accrual will generally not coincide. In general, actions in contract accrue at the date of the breach, whereas actions in tort for negligence accrue when damage is suffered. As the damage may be suffered at a later stage than the breach occurs, the limitation period for the action in tort may be longer than that applicable to the action in contract. Thus, the accrual rules lack uniformity.

⁸⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 88.

⁸⁸ [2008] 2 WLR 311; [2008] UKHL 6; [2008] All ER (D) 251 (Jan). This case concerned six appeals which raised the question of whether claims for sexual assaults and abuse which took place many years before the commencement of proceedings were barred by the English *Limitation Act 1980*. The House of Lords was called upon to determine whether such claims fell within section 2 or 11 of the English *Limitation Act 1980*. It determined that the decision in *Stubbings v Webb* [1993] AC 498 was wrongly decided on this issue. The House of Lords determined that section 11 of the *Limitation Act 1980* extended to claims for damages in tort arising from trespass to the person, including sexual assault. The case was remitted to a Queen's Bench judge to decide whether the discretion under section 33 of the *Limitation Act 1980* should be exercised in the claimant's favour. Justice Coulson concluded that the factors in the claimant's favour were more numerous and of significantly greater weight. Therefore section 33 of the *Limitation Act 1980* would be exercised in her favour - see *A v Hoare* [2008] EWHC 1573 (QB).

4.66 Ultimately, it must be recognised that the accrual test creates unfair results for some litigants. Nevertheless, it cannot be denied that as it is the traditional approach, it has the merit of familiarity.

(2) *Date of the Act or Omission giving rise to the Action*

4.67 A different approach to the running of both basic and ultimate limitation periods has been introduced in various jurisdictions in the recent decades. This involves the running of the limitation period from the date of the act or omission upon which the cause of action is based. This test has also been suggested as an alternative starting point to the discoverability test.

4.68 While in some instances (such as actions for breach of contract), the dates of the act or omission, accrual and discoverability may coincide, this is not always the case. The difference between the date of the act or omission and the date of accrual will be most marked in actions in tort for which proof of damage is a necessary element (e.g. negligence). In such cases, the damage may have occurred at a later date than that of the act or omission. The dates of the act and omission and discoverability will usually differ in cases involving latent personal injury, latent property damage, or economic loss.

4.69 The running of the basic limitation period from the date of the relevant act or omission had many advantages. It is simple and easy to understand,⁸⁹ especially by comparison to the rules governing the date of accrual. It can be calculated with a degree of certainty, but the test allows for flexibility on the basis of the judicial discretion that often complements the test.⁹⁰ It would also have the advantage of uniformity and it would mitigate the difficulties that are currently experienced as a result of the complex accrual rule.

4.70 The adoption of an act or omission test would also remedy the classification difficulties that are currently prevalent in the law of limitations, as all causes of action would run from the same date.⁹¹ It would also remedy the situation where a plaintiff has concurrent actions in contract and tort. Under the accrual rule, the plaintiff is in difficulty in determining the appropriate limitation period. Under the act or omission test, however, the action will commence on the same date if the injury or damage is immediately apparent. If not, the

⁸⁹ New Zealand Law Commission *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988), at 169.

⁹⁰ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997), at paragraph 6.60.

⁹¹ Alberta Law Reform Institute *Limitations* (Report for Discussion, 1986), at paragraph 2.184.

alternative starting point of the date of knowledge would apply in a uniform way to both claims.

4.71 There are however a number of disadvantages to the running of the basic limitation period from the date of the act or omission.

4.72 The New Zealand Law Commission, which first suggested this approach, acknowledged that the test would not solve difficulties that arise with *continuing* acts or omissions. It suggested that most cases involving a series of acts should be severable with a separate limitation period applying to each.⁹² It also recommended special provisions dealing with claims based on demands, conversion, contribution, indemnity and certain intellectual property claims.⁹³

4.73 In addition, although the date of the relevant act or omission may be clear in most cases, there are some cases in which that date may be uncertain. It has been suggested that the courts would probably develop new rules analogous to those regulating the date of accrual, about what constitutes the act or omission in particular cases, thereby adding a new complexity to the law instead of simplifying it, as intended.⁹⁴

4.74 Further, in cases where damage is an essential element of the cause of action, the running of the limitation period from the date of the act or omission in question would have the potential effect that where the damage was not suffered until a date long after the act or omission that led to the damage being caused, the limitation period would start running before the cause of action is complete.⁹⁵ It is arguable that this would be an objectionable situation.

4.75 The date of the act or omission might best be used as the commencement date for an ultimate limitation period. This is further discussed at page 238 below. It could otherwise be used as an alternative starting point to the date of knowledge in cases involving (for example) latent damage or personal injury. A further alternative would be to supplement the act or omission test with a wide extension provision under which the basic limitation period could be extended if the damage or injury was not discoverable at the date of the act or omission. Proposals of this nature have been made in New

⁹² New Zealand Law Commission *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988) at 170.

⁹³ *Ibid* at 171. It concluded that special provisions were not needed for cases relating to testamentary claims.

⁹⁴ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997) at paragraph 6.62.

⁹⁵ *Ibid* at paragraph 7.16.

Zealand,⁹⁶ New Brunswick,⁹⁷ Ontario⁹⁸ and Western Australia,⁹⁹ among other jurisdictions. In Western Australia, it has additionally been suggested that if an act or omission test was to be introduced, it may be necessary for an ultimate limitation period to be introduced, at least in cases involving personal injuries, in order to prevent undue uncertainty as to when the proverbial slate would be wiped clean.¹⁰⁰

(3) Discoverability

4.76 Where discoverability principles apply, the limitation period runs from a defined “date of knowledge”, i.e. the date when the plaintiff becomes aware - or could have become aware if exercising reasonable diligence - of the existence of the cause of action and the relevant facts relating to the cause of action. The essential feature of any discoverability rule is the relevant facts that must be within the plaintiff’s means of knowledge for the limitation period to begin running against him. Discoverability principles are based solely on the state of the plaintiff’s knowledge; the defendant’s conduct is for the most part irrelevant. A “date of knowledge” test applies in Ireland in relation to actions for damages in respect of personal injuries caused by negligence, nuisance or breach of duty,¹⁰¹ wrongful death actions,¹⁰² and actions for damages under the *Liability for Defective Products Act 1991*.¹⁰³ This greatly reduces the possibility of an injustice being done to a plaintiff who does not or cannot acquire requisite knowledge within the relevant time.

⁹⁶ New Zealand Law Commission *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988) at paragraph 309.

⁹⁷ Law Reform Branch, Office of the Attorney General, Province of New Brunswick *Limitations Act Discussion Paper* (1988) at 8-9.

⁹⁸ Ontario Limitations Act Consultation Group *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991) at 34-40.

⁹⁹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997) at paragraph 6.59.

¹⁰⁰ *Ibid* at paragraph 6.59.

¹⁰¹ Section 11(2), *Statute of Limitations 1957* as amended by section 3(1), *Statute of Limitations (Amendment) Act 1991*.

¹⁰² Section 48(1), *Civil Liability Act 1961*, as amended by section 6(1), *Statute of Limitations (Amendment) Act 1991*.

¹⁰³ Section 7(1), *Liability for Defective Products Act 1991*.

(a) Development of Discoverability

4.77 The development and application of discoverability rules resulted from three decades in which three difficulties arose. In the 1960s, the problem of latent personal injury arose. In the 1970s, the problem of latency manifested itself in another guise - property damage. The 1990s saw the emergence of cases brought by adults in respect of sexual, physical and emotional abuse suffered as a child.

4.78 The problem of what has been called “the hidden cause of action”¹⁰⁴ first arose in personal injuries cases involving industrial diseases which have a long latency period (i.e. pneumoconiosis, including silicosis and asbestosis, and mesothelioma). The injustice caused by the existing law of limitation first came to the attention of the courts in the House of Lords’ decision in *Cartledge v E Jopling & Sons Ltd.*¹⁰⁵ Here, through no fault of his own, the injured party was unaware that he has suffered injury as a result of the defendant’s conduct for a considerable period after the injury was first suffered as the injury did not manifest itself for many years. Under the accrual test, the plaintiff was unable to initiate proceedings as the limitation period had expired before he became aware of these factors.

4.79 The first model of discoverability was introduced as a response to this problem, following the recommendations of the Edmund Davies Committee in England.¹⁰⁶ That Committee recommended that the running of the limitation period should be relaxed for personal injuries actions involving latent injury. In such cases, a plaintiff would not be out of time provided that he commenced proceedings within 12 months of the earliest date on which the existence and cause of the injury could reasonably have been discovered.¹⁰⁷ Most jurisdictions (including England and Wales,¹⁰⁸ Scotland¹⁰⁹ and Ireland¹¹⁰)

¹⁰⁴ Law Reform Commission of Saskatchewan *Proposals for a New Limitation of Actions Act: Report to the Minister of Justice* (1989) at 30.

¹⁰⁵ [1963] AC 758 (HL).

¹⁰⁶ Committee on Limitation of Actions *Report on Limitation of Actions in Cases of Personal Injury* (Cmnd. 1829, 1962).

¹⁰⁷ *Ibid* at 18-19.

¹⁰⁸ English *Limitation Act 1963*, amending the English *Limitation Act 1939*.

¹⁰⁹ *Prescription and Limitation (Scotland) Act 1973* (UK) ss. 18, 22, following the Scottish Law Commission’s *Report on Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970).

enacted legislation to allow for the limitation period to run from the date on which the injury was discoverable, in cases involving latent personal injury.

4.80 From the early 1970s, the problem of latent property damage emerged.¹¹¹ Here, the difficulty lay in the fact that defects in buildings are often not observable for years after the occurrence of the damage. Applying the accrual test, many plaintiffs were unable to initiate proceedings once the defects became observable, as the limitation period had expired. The legislation enacted as a response to the latent injuries problems provided no solution and many jurisdictions were required to enact further legislation to remedy this injustice. Although the Commission recommended that Ireland follow suit, to such legislation has yet been enacted in this jurisdiction.¹¹²

4.81 The 1990s in Ireland saw the emergence of countless allegations made by adults in respect of sexual and physical abuse suffered by them as children in orphanages, industrial schools and other state-funded institutions. Commonly, the effects of this abuse remained latent until many years after it was inflicted and even where the victims were aware of these effects, the psychological effects of the abuse (and in many cases the continued dominion of the abuser over them) prevented them from initiating proceedings.¹¹³ Once again, many jurisdictions (including Ireland)¹¹⁴ enacted legislation to allow for such claims to be initiated after the expiry of the basic limitation period.

4.82 It is difficult to predict the types of claims that might feature in future decades. The recent debate surrounding a number of cases of cancer misdiagnosis dating back several years¹¹⁵ is but one examples of the type of

¹¹⁰ *Statute of Limitations (Amendment) Act 1991*, following the Commission's *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (No. 21, 1987).

¹¹¹ See e.g. *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1 (HL).

¹¹² See *The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (Report No. 62, 2001).

¹¹³ See Law Reform Commission *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (Consultation Paper No. 16, 2000).

¹¹⁴ See *Statute of Limitations (Amendment) Act 2000* (No. 13 of 2000). See also Law Reform Commission *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (Consultation Paper No. 16, 2000).

¹¹⁵ See e.g. 'What do you mean – there may be other cases of cancer misdiagnosis, Mr Drumm?', *Irish Independent*, Saturday September 27, 2008. <http://www.independent.ie/health/case-studies/what-do-you-mean-ndash-there-may-be-other-cases-of-cancer-misdiagnosis-mr-drumm-1484267.html>

case that might arise. There is a clear argument, therefore, for formulating limitation rules in such a way as to extend the discoverability rules to all causes of action, rather than rely on piecemeal amendments in response to specific cases as they arise.

4.83 It is noteworthy that the Supreme Court of Canada has gone a step further and recognised a “common law discoverability rule” under which the date of accrual is suspended until the date of discoverability, at least for actions founded in tort.¹¹⁶ This is a significant innovation in limitations law. A similar common law rule was identified by the English Court of Appeal in 1976¹¹⁷ but it was rejected by the House of Lords in 1983, which concluded that the limitation period for action founded in tort starts to run at the date of accrual, i.e. the date on which the damage occurred.¹¹⁸ The existence of a “common law discoverability rule” has not been considered by the Irish courts.

(b) Advantages

4.84 Discoverability rules accord with the general policy that plaintiffs cannot be expected to bring an action until they are aware of the existence of the cause of action. It is well accepted that plaintiffs should have a reasonable opportunity to discover the existence of the cause of action. Discoverability rules do not distinguish between different kinds of damage. They ensure that a uniform approach is taken to the running of the limitation period, and that all cases are treated alike.¹¹⁹

4.85 A further advantage is that discoverability rules allow for the length of a basic limitation period to be reduced. As indicated by the Alberta Institute, limitation periods that run from the date of discoverability may be shorter than those running from the date accrual because there is no need to allow any further time for the plaintiff to discover the existence of the claim.¹²⁰

¹¹⁶ See e.g. *Kamloops v Nielsen* [1984] 2 SCR 2, 5 WWR 1; *Novak v Bond* [1999] 1 SCR 808, 172 DLR (4th) 385.

¹¹⁷ See *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA).

¹¹⁸ *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL). This is consistent with the House of Lords’ earlier decision in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL).

¹¹⁹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36II, 1997), at paragraph 7.17.

¹²⁰ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986), at paragraph 2.147.

4.86 The adoption of a discoverability rule also obviates the need to legislate for complementary judicial discretion, which it appears is “practically always exercised in favour of the plaintiff.”¹²¹ In addition, it allows plaintiffs to avoid the expense and delay involved with the making of an application for extension of the limitation period.¹²² It would furthermore generalise the individual instances in which discoverability rules have been employed.¹²³

4.87 The Commission has acknowledged in previous publications that the introduction of discoverability as the sole starting point of a limitation period has much to offer in terms of simplicity and certainty in the law. We recommended however that overall, discoverability should be introduced only to deal with latent loss, and that the accrual test should be retained for cases of obvious or patent loss or in certain latent damage cases.¹²⁴

4.88 Although the European Court of Human Rights generally accepts that limitation periods do not *per se* infringe the Convention, the Court recently found that an inflexible three year limitation period for a child to bring proceedings for judicial recognition of paternity, running from date on which he or she reached the age of majority irrespective of the child’s awareness of its father’s identity, violated Article 8 of the Convention, in circumstances where the child only learned her father’s identity after the limitation period had expired, and it was then impossible for her to bring proceedings. The Court found that the main problem with the inflexible limitation period was the absolute nature of the time-limit rather than its *dies a quo* as such.¹²⁵ It expressed the following caution:-

“In the Court’s view, a distinction should be made between cases in which an applicant has no opportunity to obtain knowledge of the facts and, cases where an applicant knows with certainty or has grounds for assuming who his or her father is but for reasons unconnected with the law takes no steps to institute proceedings within the statutory time-limit [citations omitted].”¹²⁶

4.89 Discoverability rules take account of these considerations.

¹²¹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36II, 1997), at paragraph 7.17.

¹²² Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36II, 1997) at paragraph 7.17.

¹²³ *Ibid* at paragraph 7.24.

¹²⁴ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 3.02.

¹²⁵ *Phinikaridou v Cyprus* (app no. 23890/02, decision of 20th March, 2008) at § 62.

¹²⁶ *Ibid* at § 63.

(c) Disadvantages

4.90 As to the disadvantages, the discoverability rule carries with a degree of uncertainty for defendants. Where damage is latent, the plaintiff may not become aware of the cause of action for many years after the act or omission that gives rise to the cause of action. The defendant is, during that time, oblivious to the possibility of a claim being commenced against him or her. As noted at page 27 above, the passage of time brings with it a deterioration of the quality of evidence and the recollection of witnesses and it will consequently be more difficult for a defendant to mount an effective defence to the claim. Moreover, individuals and businesses will be required to maintain records and insurance protection for long periods, which is onerous and costly.

4.91 These difficulties could be allayed, however, by the introduction of an ultimate limitation period, running from the date of the act or omission giving rise to the cause of action or the date of accrual, beyond which no claim could be commenced irrespective of whether the claim was discoverable before that date. This would accord with the argument that “justice to plaintiffs requires some sacrifice as to certainty.”¹²⁷ This is discussed in greater depth at page 221.

4.92 The Law Commission for England and Wales has accepted that the discoverability rule is inherently less certain than the date of accrual and that there is, therefore, a risk that it will produce some satellite litigation. It stressed, however, that this danger could be exaggerated and that the advantages of a uniform starting date outweigh the disadvantages.¹²⁸

(d) Action-Specific Formulations of the “Date of Knowledge”

4.93 An assortment of different formulations of the various types of knowledge required in order for a claim to be deemed ‘discoverable’ have been employed in various jurisdictions. Typically, discoverability tests depend upon the acquisition of knowledge of specified matters and issues by the plaintiff. This leads to definitional problems as to what is meant by ‘knowledge’ and whether a plaintiff can be fixed with constructive notice of certain facts.

4.94 There has been something of an evolution in the definition of the date of knowledge. With each phase of this evolution has come a marked simplification of the criteria and the manner in which the test is drafted.

¹²⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No 151, 1998) at 253.

¹²⁸ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 41.

(i) Latent Personal Injuries Cases

4.95 There has been an evolution in the tests employed in England and Wales with respect to the 'date of knowledge' in actions involving latent personal injuries. The first formulation, under the English *Limitation Act 1963*, focused on what were termed "material facts of a decisive character", while a revised formula introduced under the English *Limitation Acts 1975 and 1980* focused on actual and constructive knowledge. The latter formula was introduced in Ireland under the *Statute of Limitations Act 1991*, with some minor variations.

(l) "Material Facts of a Decisive Character"

4.96 Under the English *Limitation Act 1963*, the date of knowledge was when the plaintiff had within his means of knowledge all "*material facts of a decisive character*" relating to the right of action.¹²⁹ That model has been described as "the forerunner of the recent statutes expanding the use of a discovery rule."¹³⁰ It was repealed by the English *Limitation Act 1975*, but it remains of historical significance.

4.97 Under the 1963 Act, the "*material facts*" of which the plaintiff was required to have knowledge were as follows:

- (a) The fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;
- (b) The nature and extent of the personal injuries resulting from that negligence, nuisance or breach of duty;
- (c) The fact that the personal injuries so resulting were attributable to the negligence, nuisance or breach of duty, or the extent to which any one of those personal injuries were so attributable.¹³¹

4.98 Facts were considered "*decisive*" if they were facts:-

"[...] which to a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that [...] an action would have a reasonable prospect of succeeding and of

¹²⁹ Sections 1-2, *Limitation Act 1963* (UK) (as enacted).

¹³⁰ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion, September 1986) at 108-109.

¹³¹ Section 7(3), *Limitation Act 1963* (UK) (as enacted).

resulting in the award of damages sufficient to justify the bringing of the action.”¹³²

4.99 The discoverability formula contained in the 1963 Act was adopted in Queensland,¹³³ New South Wales,¹³⁴ South Australia,¹³⁵ Northern Territory,¹³⁶ Manitoba,¹³⁷ and with variations in Victoria.¹³⁸ Notably, these jurisdictions all granted the court discretion to extend the limitation period (“the court may”),¹³⁹ whereas the English provision provided for such an extension as of right (“the court shall”).¹⁴⁰

4.100 This early discoverability formula was problematic. Although the 1963 Act set out what facts were “material”, and “decisive”, there remained much difficulty with the question of what knowledge was required of the plaintiff to start time running.¹⁴¹ The drafting of the statutory formula was not sufficiently tight to cover the cases intended to be covered, but no others. Additionally, when faced with hard cases, the courts placed a construction on the statute that went beyond its natural meaning, in order to avoid injustice.¹⁴² Difficulties also arose in the application of the test to wrongful death actions.

¹³² *Ibid* at section 7(4).

¹³³ Sections 30-32, *Limitation of Actions Act 1974* (Qld) - remains in force.

¹³⁴ Sections 58-60, *Limitation Act 1969* (NSW) - no longer in force.

¹³⁵ Section 48, *Limitation of Actions Act 1936* (SA), s 48 - inserted by the *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA).

¹³⁶ Section 44, *Limitation Act 1981* (NT).

¹³⁷ Section 14, *Limitation of Actions Act 1987* (Man).

¹³⁸ Section 23A, *Limitation of Actions Act 1958* (Vic), as enacted in 1972 (now repealed). This did not require the material fact to be of a decisive character. It was repealed in 1983.

¹³⁹ For a discussion of this discretion, see the judgment of the High Court of Australia in *Brisbane South Regional Health Authority v Taylor* (1996) 70 ALJR 866.

¹⁴⁰ Section 2, *Limitation Act 1963* (UK).

¹⁴¹ In *Central Asbestos Co Ltd v Dodd* [1973] AC 518, for example, Lord Reid said at 529: “I think this Act has a strong claim to the distinction of being the worst drafted Act on the statute book.” See further Davies “Limitations of the Law of Limitation” (1982) 98 LQR 249.

¹⁴² Law Reform Committee *Twentieth Report: Interim Report on Limitation of Actions in Personal Injury Claims* (Cmnd. 5630, 1974) at paragraph 15.

(II) *Actual & Constructive Knowledge*

4.101 A revised formula was contained in the English *Limitation Act 1975*, which was re-enacted under the English *Limitation Act 1980*.¹⁴³ Under the 1980 Act, alternative starting points apply to actions to recover damages for personal injuries. Thus, the limitation period for such actions begins to run from either:

- (a) The date of accrual of the cause of action; *or*
- (b) The 'date of knowledge' of the plaintiff (if later).¹⁴⁴

4.102 The date of knowledge is the first date on which the plaintiff had knowledge of *all* of the following facts:

- (a) That the injury in question was "significant";
- (b) That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
- (c) The identity of the defendant; and
- (d) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the action against the defendant.¹⁴⁵

4.103 An injury is "significant" if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.¹⁴⁶ It is irrelevant whether or not the plaintiff had knowledge that the acts or omissions do or do not involve negligence, nuisance or breach of duty, as a matter of law.¹⁴⁷

4.104 The 1980 Act fixes a plaintiff with constructive knowledge of facts that he or she might reasonably have been expected to acquire from facts observable or ascertainable by him, or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.¹⁴⁸ A plaintiff is not fixed with knowledge of a fact ascertainable only

¹⁴³ See *Limitation Act 1980* (c.58).

¹⁴⁴ Section 11(4), *Limitation Act 1980* (c.58).

¹⁴⁵ *Ibid* at section 14(1).

¹⁴⁶ *Ibid* at section 14(2).

¹⁴⁷ *Ibid* at section 14(1).

¹⁴⁸ *Ibid* at section 14(3).

with the help of expert advice, so long as the plaintiff has taken all reasonable steps to obtain (and where appropriate to act upon) that advice.¹⁴⁹

4.105 The formula used in the 1975 and 1980 Acts has been criticised on a number of grounds.¹⁵⁰ It does not assist a plaintiff who has been incorrectly advised by a solicitor that he has no cause of action, but may assist a plaintiff whose solicitor fails to discover facts relating to a proposed claim. It is unclear whether a plaintiff's fear of obtaining advice, his ignorance as to how or where to seek advice, or his inability to pay, are to be considered in the determination of what advice is considered reasonable for the plaintiff to have sought. It is also unclear whether or not "appropriate" advice must involve consultation with a solicitor, or whether, for example, a trade union official might suffice. Moreover, it is unclear whether or not the plaintiff is fixed with constructive knowledge of facts that an expert failed (negligently or otherwise) to discover.¹⁵¹

4.106 In addition, the determination of significance according to this assumption is problematic as "it is almost every cough or sprain that will be sufficiently serious to justify an action" as against a defendant who does not dispute liability and has sufficient assets to satisfy an award.¹⁵² Thus, the test for significance might be said to be unrealistic.

4.107 It has been argued that because the discoverability rule as formulated under the 1975 and 1980 Acts works unfairly in certain cases, it will always be necessary to provide for recourse to a judicial discretion to allow an action to be brought notwithstanding the expiration of the limitation period.¹⁵³

(III) *The Date of Knowledge test in Ireland*

4.108 The 'date of knowledge' test introduced under the *Statute of Limitations 1991*, which applies in cases involving latent personal injury, is similar to that employed under the English 1975 and 1980 Acts. Under the 1991 Act, a person has the relevant knowledge if he or she knows the following:-

¹⁴⁹ *Ibid* at section 14(3).

¹⁵⁰ See e.g. Davies "Limitations of the Law of Limitation" (1982) 98 LQR 249; Mullany "Reform of the Law of Latent Damage" (1991) 54 MLR 349.

¹⁵¹ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No. 36 Part I, 1982), at paragraph 3.13.

¹⁵² Davies "Limitations of the Law of Limitation" (1982) 98 LQR 249, at 257.

¹⁵³ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions: Latent Disease and Injury* (Project No. 36 Part I, 1982), at paragraph 3.13.

- (a) That the person alleged to have been injured had been injured;
- (b) That the injury in question was significant;
- (c) That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
- (d) The identity of the defendant; and
- (e) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.¹⁵⁴

4.109 Thus, evidently, there is an additional requirement that plaintiff knows that the person who is alleged to have been injured has, in fact, been injured.

4.110 Unlike the English Acts, the Irish Act does not define what is considered 'significant'. The Courts have interpreted this to mean that the Oireachtas intended that the section should not be confined to the meaning attributed to "significant" under the English Acts.¹⁵⁵

4.111 The formula employed the concepts of actual and constructive knowledge. The plaintiff is fixed with constructive knowledge in the same manner as under the English *Limitation Act 1980*. Thus, under the 1991 Act, a person's "knowledge" includes knowledge that he or she might reasonably have been expected to acquire:

- (a) From facts observable or ascertainable by him, or
- (b) From facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.¹⁵⁶

4.112 The 1991 Act provides that a person will not be fixed with knowledge of a fact that could only be ascertained with the help of expert advice, so long as he has taken all reasonable steps to obtain that advice. Additionally, the Act provides that no person will be fixed with knowledge of a fact relevant to the injury that he has failed to acquire by virtue of that injury.¹⁵⁷

¹⁵⁴ Section 2(1), *Statute of Limitations (Amendment) Act 1991*.

¹⁵⁵ See *Whitely v Minister for Defence* [1998] 4 IR 442; affirmed by the Supreme Court in *Bolger v O'Brien* [1999] 2 ILRM 372.

¹⁵⁶ Section 2(2), *Statute of Limitations (Amendment) Act 1991*.

¹⁵⁷ Section 2(3), *Statute of Limitations (Amendment) Act 1991*.

(ii) Latent Damage Cases (not involving personal injuries)

4.113 The elements of the discoverability test for non-personal injury actions will not necessarily be the same as those for personal injuries actions.

4.114 Under amendments introduced by the English *Latent Damage Act 1986*,¹⁵⁸ the limitation period in latent damages cases not involving personal injury runs, under the English *Limitation Act 1980*, from what is termed “the starting date”. Notably, the relevant sections do not use the term “discoverability” or “date of knowledge”. The “starting date” is defined as:-

“the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.”¹⁵⁹

4.115 The ‘knowledge required’ means knowledge of both:-

- (a) The “material facts” about the relevant damage, and
- (b) The “other facts” relevant to the current action.¹⁶⁰

4.116 The “material facts” that must be within the plaintiff’s knowledge are those which would lead a reasonable person who has suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.¹⁶¹ The “other facts” are:-

- (a) That the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;
- (b) The identity of the defendant; and
- (c) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.¹⁶²

¹⁵⁸ Enacted as a reaction to the decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1, where it was determined that the time would run in defective building cases where damage was suffered, whether it was detectable or not.

¹⁵⁹ Section 14A(5), *Limitation Act 1980* (c.58), inserted by the *Latent Damage Act 1986* (c.37).

¹⁶⁰ *Ibid* at section 14A(6).

¹⁶¹ *Ibid* at section 14A(7).

¹⁶² *Ibid* at section 14A(8).

4.117 This is subject to a long-stop of 15 years from the date on which there occurred an act or omission that is alleged to constitute negligence and to which the damage in respect of which damages are claimed is alleged to be attributable, whether in whole or in part. The long-stop bars the right of action in such cases notwithstanding that the action has not yet accrued or the starting date has not yet occurred.¹⁶³

4.118 This definition is convoluted and has led to definitional problems.¹⁶⁴

(I) *Previous Recommendations – Latent Damage*

4.119 In the 2001 *Report on Actions in Contract and Tort in Respect of Latent Damage (other than Personal Injury)*, the Commission sought to formulate a date of knowledge test for actions involving latent damage, apart from personal injuries actions. To this end, the differences between the formula contained in the *Irish Statute of Limitations (Amendment) Act 1991* and the *Alberta Limitations Act 1996* were discussed.¹⁶⁵ We recommended the introduction of a formula similar to that currently employed in Alberta (discussed further at page 210 below) under which the date of knowledge for latent damages actions not involving personal injuries would be the date on which the plaintiff first knew or in the circumstances ought *reasonably* have known the following:

- i) That the loss for which the plaintiff seeks a remedy had occurred;
- ii) That the damage was attributable to the conduct of the defendant;
and
- iii) That the loss, assuming liability on the part of the defendant, warrants bringing proceedings.¹⁶⁶

4.120 This formula abandoned the requirement that the plaintiff should know that the loss or damage suffered was “significant”.¹⁶⁷ The Commission acknowledged that in abandoning the formula employed in the 1991 Act, there was a risk of further fragmentation of an already fragmented limitations regime. It was considered, however, that as the existing formula was unnecessarily

¹⁶³ *Ibid* at section 14(B).

¹⁶⁴ See McGee *Limitation Periods* (5th ed 2006) at paragraphs 6.012-6.021.

¹⁶⁵ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 2.51.

¹⁶⁶ *Ibid* at paragraph 2.54.

¹⁶⁷ *Ibid* at paragraph 2.45.

complex and that its interpretation has caused difficulty, a new model should be introduced.¹⁶⁸

4.121 The Commission acknowledged that a non-personal injury discoverability test would inevitably include an actual knowledge and a constructive knowledge element.¹⁶⁹ A detailed examination of the options available was carried out and we favoured the introduction of an objective test of reasonableness tempered only by certain subjective elements, starting on the date on which the plaintiff knew or ought to have known, in the circumstance, of the relevant facts. Under this formulation, a constructive knowledge test employs a “reasonable man” standard, which is equivalent to the “reasonable man” test that has been developed in the law of torts. The relevant question is “when should the plaintiff, as a reasonable person, have known of the relevant facts?”¹⁷⁰ The Commission considered that this option “strikes the desired balance between a purely objective and a subjective standard of reasonableness.”¹⁷¹ We recommended the addition of the word “reasonably” to the Alberta formula, in order to emphasize the intention to apply the “reasonable man” test.¹⁷² Those recommendations have not been implemented.

(iii) Actions in respect of Defective Products

4.122 Under the English *Limitation Act 1980*, as amended, the date of knowledge for the purpose of defective products litigation is the date on which the plaintiff first had knowledge of the following facts:

- (a) Such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and
- (b) That the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; *and*
- (c) The identity of the defendant.

4.123 The 1980 Act, as amended, provides that the extent of a plaintiff’s knowledge as to whether or not facts or circumstances constituted a defect, or

¹⁶⁸ *Ibid* at paragraph 2.45.

¹⁶⁹ *Ibid* at paragraph 2.20.

¹⁷⁰ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 2.26.

¹⁷¹ *Ibid* at paragraph 2.27.

¹⁷² *Ibid* at paragraph 2.28-2.29.

as to the existence or otherwise of a right of action, are not relevant to the determination of the date of knowledge.¹⁷³

4.124 Under the Irish *Liability for Defective Products Act 1991*, the date of knowledge is the date on which the plaintiff became aware, or should reasonably have become aware, of the following:

- the damage;
- the defect; and
- the identity of the producer.¹⁷⁴

4.125 This formula has the benefit of simplicity, by comparison to its complex English counterpart.

(e) Formulating a General ‘Date of Knowledge’ test

4.126 The Commission is of the view that in order to achieve maximum clarity, it is essential that the ingredients of the “date of knowledge” are spelled out precisely in legislation. The legislation should state – clearly and directly – what knowledge is required in order for the limitation period to run. At the same time, it is important for the date of knowledge test to be simple and easily understood.

4.127 The formulation of a general discoverability test, applicable across the board to a wide variety of actions, has been addressed in a number of jurisdictions. Some of those formulations will now be explored.

(i) Alberta Institute

4.128 In its seminal work published in 1986, the Alberta Institute formulated a general discoverability rule, designed with simplicity in mind, which would apply to a wide range of civil actions. The Institute carried out a detailed analysis of the amount of knowledge that a plaintiff must possess in order to trigger the running of the limitation period. It listed five types of knowledge that it considered could be used in formulating a functional discovery rule:-

- (i) Knowledge of the harm sustained;
- (ii) Knowledge that the harm was attributable in some degree to conduct of another;
- (iii) Knowledge of the identity of the person to whose conduct the harm was attributable;

¹⁷³ Section 14(1A), *Limitation Act 1980*, inserted by section 3 of Schedule I of the *Consumer Protection Act 1987*.

¹⁷⁴ Section 7(1), *Liability for Defective Products Act 1991*.

- (iv) Knowledge that the harm was sufficiently serious to have justified bringing an action; and
- (v) Knowledge that an action against the defendant would have a reasonable prospect of success, as a matter of law.¹⁷⁵

4.129 The Institute adopted a solution containing the types of knowledge listed at (i) to (iv), to exclusion of type (v). It noted that type (iv) involves a significant value judgment which gives the court some latitude in determining the date of discoverability. With that in mind, the Institute did not recommend the adoption of judicial discretion.

4.130 Under the revised Alberta *Limitations Act 2000*, which broadly enacted the recommendations of the Alberta Institute, the date of knowledge is the date on which the claimant first knew, or in the circumstances ought to have known, all of the following:

- (i) That the injury had occurred; *and*
- (ii) That the injury was attributable to conduct of the defendant; *and*
- (iii) That the injury warrants bringing proceedings, assuming liability on the part of the defendant.¹⁷⁶

4.131 This formulation differs from the English formula in that it is a great deal simpler and it does not focus on the ‘significance’ of the injury. Moreover, it focuses on what the claimant actually knew or should have known in the circumstances, and not on what a fictional reasonable man ought to have discovered. A similar formulation was recommended by the New Zealand Law Commission,¹⁷⁷ and by the Law Reform Commission of Western Australia.¹⁷⁸

(ii) Law Commission for England and Wales

4.132 In 2001, the Law Commission for England and Wales published its final recommendations on the introduction of a core limitations regime. It noted that over 80% of consultees were in favour of the retention of the requirement that a plaintiff know that the injury, loss, damage or benefit was “significant”. It considered that such a requirement serves the following dual purpose:-

¹⁷⁵ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at 114-115.

¹⁷⁶ Section 3(1)(a), *Limitations Act* RSA 2000, c.L-12.

¹⁷⁷ Clauses 14(3) and (4), *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). See further column 4 of the Claims Table, contained in Schedule 1 to the draft Bill.

¹⁷⁸ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997), at paragraph 7.21.

“First, it delays the start of the limitation period to protect the claimant who has received an injury, or suffered damage or loss, which at first seems trivial when it later becomes clear that the injury, loss or damage is far more serious.

Secondly, it reduces the pressure on a claimant who has received a trivial injury or loss to bring proceedings immediately, without waiting to see if the injury or loss gets worse, for fear of being time-barred. Without this assurance the amount of premature litigation could significantly increase.”¹⁷⁹

4.133 The Law Commission recommended that the ‘date of knowledge’ should be the date on which the claimant has actual or constructive knowledge of the following facts:-

- (1) The facts that give rise to the case of action;
- (2) The identity of the defendant; and
- (3) Where injury, loss or damage has occurred or a benefit has been received, that the injury, loss, damage, or benefit are significant.¹⁸⁰

4.134 It concluded that there was no alternative to defining ‘significance’ in the manner already defined and it therefore proposed that a claimant would be aware that the injury, loss, damage or benefit was “significant” where:-

- (1) The claimant knows the full extent of the injury, loss or damage suffered, or of any benefit obtained by the defendant; *or*
- (2) A reasonable person would think that, on the assumption that the defendant does not dispute liability and is able to satisfy a judgment, a civil claim was worth making in respect of the injury, loss, damage or benefit concerned.¹⁸¹

4.135 Thus, the Law Commission followed the approach of the current law with regard to the definition of the term “significant”.

4.136 It further recommended that a lack of knowledge that the facts would give rise to a cause of action should, as a matter of law, be irrelevant.¹⁸² It also proposed that ‘actual knowledge’ should not be statutorily defined and should be treated as a straightforward issue of fact which does not require

¹⁷⁹ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 44.

¹⁸⁰ *Ibid* at 47.

¹⁸¹ *Ibid* at 48.

¹⁸² *Ibid* at 50.

elaboration.¹⁸³ The Law Commission recommended that a claimant be considered to have ‘constructive knowledge’ of the relevant facts when he or she, in his or her circumstances and with his or her abilities, ought reasonably to have known of the relevant facts.¹⁸⁴

4.137 The Law Commission recommended that the claimant should not be treated as having constructive knowledge of any fact that an expert might have acquired unless the claimant acted unreasonably in not seeking advice from an expert. Moreover, where the claimant has in fact consulted an expert, he or she should not be fixed with constructive knowledge of any information that the expert acquired and failed to communicate to the claimant, or failed to acquire.¹⁸⁵ Recommendations were additionally as to the relevance of the knowledge of the plaintiff’s agents, the application of the ‘date of knowledge’ test to corporate organisations, and the application of that test in cases involving joint-claimants or assignments.¹⁸⁶

(4) Alternative Starting Dates: Accrual or Discoverability

4.138 As a result of criticism of the model employed under the English *Limitation Act 1963*, a new formula for the running of the limitation period in difficult cases was devised - the use of alternative starting points running the date of accrual or from the date of knowledge (if later). These have been employed in a piecemeal fashion in order to remedy injustices as they arise.

(a) Existing Models

4.139 Alternative starting dates have been applied to actions in relation to latent personal injuries or property damage, and defective products. In some jurisdictions the alternatives are supplemented by judicial discretion while in others, they are not. There is little consistency in the manner in which the alternative starting dates have been applied.

(i) Latent Personal Injuries Cases

4.140 Alternative starting dates were first introduced in England for the running of the limitation period in personal injuries claims.¹⁸⁷ As seen above, under the English *Limitation Act 1980*, the limitation period for such actions begins to run from either:

¹⁸³ *Ibid* at 51.

¹⁸⁴ *Ibid* at 53.

¹⁸⁵ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 55.

¹⁸⁶ *Ibid* at 56-65.

¹⁸⁷ *Limitation Act 1975; Limitation Act 1980* (c.58).

- (a) The date of accrual; *or*
- (b) The date of knowledge (if later).¹⁸⁸

4.141 In addition, the courts in England and Wales have a broad discretion to override the limitation period even where the plaintiff had knowledge before that date, where the court considers it equitable to do so.¹⁸⁹ No long-stop limitation period applies, and there is no limitation on the time after which the court can exercise its discretion. This is further discussed at page 269 below. Analogous provisions have been introduced in Scotland.¹⁹⁰

4.142 Under this model, the limitation period will only begin to run on the date of accrual when the claimant discovered the cause of action at that date. Otherwise, the limitation period will run from the date of knowledge. The Alberta Institute has pointed out that under this system, the 'date of knowledge' is not an alternative to the date of accrual; instead, it completely abrogates the date of accrual test. The Institute found this to be "unnecessarily complex and confusing". It expressed its disapproval as follows:-

"If a discovery rule is ultimately to control the beginning of a limitation period, we do not think that the statute should initially apply an accrual rule and then subsequently substitute a discovery rule; the discovery rule should be used in the first place."¹⁹¹

4.143 A system of alternative starting dates analogous to the English system was introduced in Ireland under the *Statute of Limitations (Amendment) Act 1991* for personal injuries actions¹⁹² although under the 1991 Act no long-stop period applies and no judicial discretion is provided for.

¹⁸⁸ Section 11(4), *Limitation Act 1980* (c.58).

¹⁸⁹ Section 33, *Limitation Act 1980* (c.58).

¹⁹⁰ *Prescription and Limitation (Scotland) Act 1984*. This was the result of the Scottish Law Commission's *Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions* (Scot Law Com No 74, 1983). Section 19A had already been added to the *Prescription and Limitation (Scotland) Act 1973* by section 23 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980*.

¹⁹¹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No.4, 1986) at 113.

¹⁹² Section 3(1), *Statute of Limitations (Amendment) Act 1991*. The 1991 Act substantially implemented the recommendations of the Commission in its *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21, 1987).

(ii) Latent Damage Cases (not involving personal injuries)

4.144 Following the recommendations of the Scarman Committee in 1984,¹⁹³ the English *Latent Damage Act 1986* amended the *Limitation Act 1980* so as to introduce alternative limitation periods for actions in respect of latent damage not involving personal injury. Under the 1980 Act, as amended, the limitation period is either:

- (a) Six years from the date of accrual; or
- (b) Three years from the “starting date”, if that period expires later than the date of accrual.¹⁹⁴

4.145 The definition of the “starting date” is discussed at page 207 above. A 15-year long-stop applies to these cases, running from the last date of the act or omission giving rise to the cause of action:

- (a) which is alleged to constitute negligence; and
- (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).¹⁹⁵

4.146 This “overriding time-limit” applies irrespective of whether the cause of action has accrued.¹⁹⁶

(iii) Actions in respect of Defective Products

4.147 The English *Limitation Act 1980* also applies alternative starting points to actions in respect of defective products under the *Consumer Protection Act 1987* where the damage alleged consists of or includes personal injury or damage to or loss of property.¹⁹⁷ The limitation period runs for three years either from accrual or from the date of knowledge (if later).¹⁹⁸ The courts

¹⁹³ Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (Cmnd. 9390, 1984).

¹⁹⁴ Section 14A(4), *Limitation Act 1980*, introduced by the *Latent Damage Act 1986*. See further Mullany “Reform of the Law of Latent Damage” (1991) 54 MLR 349.

¹⁹⁵ Section 14A(B), *Limitation Act 1980*, inserted by the *Latent Damage Act 1986*.

¹⁹⁶ *Ibid* at section 14A(B)(2), inserted by the *Latent Damage Act 1986*.

¹⁹⁷ *Ibid* at section 11A, introduced by section 6(6) and Schedule 1 of the *Consumer Protection Act 1987*.

¹⁹⁸ *Ibid* at section 11A(3). All other actions for damages under the provisions of the 1987 Act run for ten years from the “relevant time”. See *ibid* at section 11A(4).

have discretion to extend this limitation period, but only where the cause of action includes personal injuries.¹⁹⁹

4.148 Alternative starting points also apply to actions for damages in Ireland under the *Liability for Defective Products Act 1991*, as seen above at page 77. The three year limitation period runs from the date of accrual or the date of knowledge (if later).²⁰⁰ A ten-year long-stop limitation period applies, running from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.²⁰¹ There is no judicial discretion to extend this limitation period in Ireland.

(b) Advantages

4.149 The introduction of alternative starting dates would mean that the familiarity of the accrual test would be retained, thereby ensuring consistency in the rules applicable to the running of limitation periods for different causes of action, while justice would be ensured for plaintiffs who are unable to discover their cause of action for a period of time after the date of accrual.

(c) Disadvantages

4.150 It has been argued that where alternative starting dates are employed, the original limitation period becomes redundant and the reality is that the limitation period runs from the date of knowledge in all cases.²⁰² The Law Reform Commission of Western Australia has noted as follows:

“Either the damage is immediately discoverable, in which case the limitation period starts running straight away, or it is not discoverable, in which case the limitation period does not start to run until it becomes discoverable.”²⁰³

4.151 The Alberta Institute questioned the practice of setting a fixed limitation period running either from accrual or discoverability, for two reasons.

¹⁹⁹ Section 33(1), *Limitation Act 1980*, inserted by section 6 of Schedule 1 to the *Consumer Protection Act 1987*. This discretion does not apply to the limitation period for defective products actions where the damages claimed by the plaintiff are confined to damages for loss of or damage to any property. See section 33(1A) of the Act.

²⁰⁰ Section 7(1), *Liability for Defective Products Act 1991*.

²⁰¹ *Ibid* at section 7(2)(a).

²⁰² Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 3611, 1997) at paragraph 7.22.

²⁰³ *Ibid* at paragraph 7.22.

First, the traditional fixed limitation period running from accrual was designed to allow plaintiffs enough time to discover the cause of action, attempt to settle and assert his claim. Where a discovery rule applies in the alternative, the period of limitation running from discovery should not be the same length as the period of limitation running from accrual - instead, the period running from discovery should be shorter as no time is needed thereafter to allow the claimant to discover the cause of action.²⁰⁴ The introduction of two different limitation periods, dependent on the date on which the period begins to run, would contribute to the complexity of the law and subvert the apparent simplicity imported by the introduction of a discoverability rule.

4.152 The second reason for which the Alberta Institute challenged the practice of setting alternative starting points is that categories of action were ascribed different lengths of limitation period based on the usual time required for discovery for that type of action. It was thought that some types of action would tend to be discovered more quickly than others, and this was reflected in the applicable limitation periods. Where the limitation period runs from the date of discovery, these considerations no longer apply.²⁰⁵

4.153 The Alberta Institute instead recommended the adoption of a single running date, namely the date of discovery.

(d) Previous Recommendations

4.154 In a Consultation Paper published in 1998 on the subject of the limitation of actions in contract and tort excluding personal injuries, the Commission was divided as to whether discoverability alone would function as the sole starting point for the running of the limitation period, or whether it should function as an alternative to the accrual test.²⁰⁶ A number of Commissioners expressed a preference for discoverability as the sole test, as this would obviate the complexity involved in the initial ascertainment of accrual, followed by the application of a discoverability test, with a calculation as to which is later. In the Report published on the subject in 2001, the Commission

²⁰⁴ Alberta Institute for Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at paragraph 2.146-2.147.

²⁰⁵ *Ibid* at paragraph 2.148.

²⁰⁶ Law Reform Commission *Consultation Paper on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 58, 1998).

agreed that this option had much to offer in terms of simplicity and certainty in the law.²⁰⁷

4.155 The Commission recommended that discoverability should be introduced only to deal with latent loss. It was the Commission's view that by retaining the accrual test, any advantage for a plaintiff stemming from the date of accrual in cases of obvious or patent loss, or indeed in certain latent damage cases, could be retained.²⁰⁸ We did not see any reason to abolish the accrual test as the starting point of the limitation period for cases of patent or obvious loss. It was considered that the date of accrual generally works well in such cases, since this date does not usually differ from the date of the discovery of the damage.²⁰⁹ The Commission was influenced by the desirability of consistency in the law and cohesiveness between the different limitation periods that exist for different types of action.²¹⁰

4.156 The Commission did not consider that it would be appropriate to recommend an entirely separate regime for patent loss in tort and contract, excluding personal injury, as the accrual test applied to the general law of limitations outside the scope of that Report.²¹¹ It was noted, however, that there is a need for a re-examination of the entire law of limitations.²¹²

4.157 The Commission therefore recommended the adoption of alternative starting dates for actions claiming damages for breach of duty whether the breach occurs in tort, contract, statute or independent of any such provision (with the exception of libel, slander or injurious falsehood).²¹³ Under this recommendation, the limitation period for such actions would be either:

- (a) Six years from the date on which the cause of action accrued; or
- (b) Three years from the date of discoverability.²¹⁴

²⁰⁷ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 3.02.

²⁰⁸ *Ibid* at paragraph 3.02.

²⁰⁹ *Ibid* at paragraph 3.02.

²¹⁰ *Ibid* at paragraph 3.03.

²¹¹ *Ibid* at paragraph 3.03.

²¹² *Ibid* at paragraph 3.03.

²¹³ *Ibid* at paragraph 2.40.

²¹⁴ *Ibid* at paragraph 2.54.

4.158 The Commission considered that the introduction of alternative starting dates gives the plaintiff the best of both worlds, while leaving the defendant no worse than under the present law.²¹⁵

(5) Conclusion and Provisional Recommendation

4.159 The Commission recalls that the date from which the basic limitation period should run should be chosen so as to eliminate the difficulties that arise with respect to the date of accrual, to ensure that the limitation period does not begin to run before the plaintiff knows of its existence, and to remedy any injustice that might arise if a short basic limitation period was to run from the date of the act or omission giving rise to the cause of action. Accordingly, the Commission has concluded, on the basis of the analysis in this Part of the Chapter, that the basic limitation period should run from the date of knowledge of the plaintiff.

4.160 *The Commission provisionally recommends that the basic limitation period should run from the date of knowledge of the plaintiff.*

²¹⁵ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 3.04.

CHAPTER 5 A UNIFORM ULTIMATE LIMITATION PERIOD?

A Introduction

5.01 In this Chapter, the Commission turns to examine the concept of an ‘ultimate limitation period’ or ‘long-stop’ limitation period. The ultimate limitation period is a period of limitation beyond which no action can be brought, even if the cause of action has not yet accrued or is not yet discoverable.

5.02 In Part B, the Commission examines the history of ultimate limitation periods. In Part C, the Commission re-examines its previous recommendations on the introduction of ultimate limitation periods in specific civil actions. In Part D, the Commission examines the range of ultimate limitation periods enacted in other States, which include periods of 10, 15 and 30 years’ duration. In Part E, the Commission examines the issue of the dates from which the ultimate limitation period should run, again based on a comparative analysis of the situation in other jurisdictions. In Part F, the Commission examines the various approaches that have been taken to the application of ultimate limitation periods in personal injuries actions.

B History of the Ultimate Limitation Period

5.03 A ‘long-stop’ or ‘ultimate limitation period’ is a period of limitation beyond which no action can be brought, even if the cause of action has not yet accrued or is not yet discoverable. The idea of an ultimate limitation period dates back as far as the *Real Property Limitation Act 1833*, where it was possible to extend limitation periods for actions to recover land in the event of infancy or other disability only up to a period of 40 years from the date on which the cause of action accrued.¹ This period was later reduced to 30 years.² Such provisions provide support to the security of title to land, since a vendor of land must show a chain of title to the land commencing at least 30 years before the date of the sale. Such provisions are not, however, confined to land actions, and have been adapted to many other actions. England and Wales, New Zealand and most Australian and Canadian jurisdictions have retained such ultimate limitation periods.

¹ Section 17, *Real Property Limitation Act 1833* (3 & 4 Will IV, c 27).

² Section 5, *Real Property Limitation Act 1874* (37 & 38 Vic, c 57).

5.04 Modern ultimate limitation periods were first introduced in New South Wales and British Columbia. Many other jurisdictions have followed suit.

5.05 The introduction of a generally-applicable ultimate limitation period would not be without precedent in Ireland. As discussed already in Chapter 2, a 10 year ultimate limitation period already applies at present in Ireland as required by the 1985 EC Directive on Product Liability,³ implemented by the *Liability for Defective Products Act 1991*⁴ (this does not apply to product liability claims based on the common duty of care of manufacturers and producers).

(1) Advantages of an Ultimate Limitation Period

5.06 The purpose of an ultimate limitation period is to achieve certainty in the legal system. While the introduction of a discoverability test swings the balance in favour of plaintiffs, the introduction of a complementary ultimate limitation period would function as a safeguard for defendants against the risk of liability for an indefinite period.⁵ It has been noted that ultimate limitation periods are “essential for the achievement of the objectives of a limitations system.”⁶

5.07 It is arguable that statutes of limitations should not allow an indefinite length of time for the bringing of an action. The premise is that after a lengthy period has elapsed, “the slate should be cleaned at this stage for the peace and repose of the collective society and its individual members.”⁷ After the lapse of a decade or more following the events giving rise to the cause of action, the vast majority of claims have been litigated, settled or abandoned, giving rise to the following argument:-

“By this time, the cost burden imposed on potential defendants, and through them on the entire society, of maintaining records and insurance to secure protection from a few possible claims will have become higher than can reasonably be justified relative to the benefits which might be conferred on a narrow class of possible claimants.”⁸

³ Directive 85/374/EEC.

⁴ Section 7(2)(a), *Liability for Defective Products Act 1991*.

⁵ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 284.

⁶ Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 35.

⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.197.

⁸ *Ibid* at paragraph 2.197.

5.08 Ultimate limitation periods have the advantage of certainty, because once they have been reached, the defendant knows where he stands.⁹ The defendant will not be unfairly asked to respond to, and defend, a claim after a significant passage of time. In general, the longer the time that elapses after an event, the greater the chances of stale testimony and evidence being adduced before the courts. As was adeptly put by the New Zealand Law Commission:

“Memories can dim. Witnesses can die or disappear. Records can be disposed of. Changes (in land values for example, or professional standards) can make it very difficult for expert witnesses to take their minds back to what the situation was some years previously. It can be difficult or impossible for civil engineers (for example) to assess the position if land or chattels are no longer available either in the state they were in at the relevant time or at all.”¹⁰

5.09 This inevitably makes the judge and / or jury’s decision more difficult. It follows that the longer the limitation period, the greater the risk of injustice to the parties and the less the opportunity to have a fair trial.

5.10 Ultimate limitation periods reduce the risk of injustice to defendants. They therefore primarily protect the interests of the defendant. The introduction of a generally applicable ultimate limitation period, combined with a basic limitation period running from discoverability, would ensure that prospective defendants would not have to indefinitely renew insurance cover. This is particularly important for retired professionals to whom the only available professional negligence cover is on a claims-made basis.¹¹ The introduction of an ultimate limitation period would also clarify the point until which records should be maintained and after which they could be destroyed.

5.11 Moreover, ultimate limitation periods compensate for the loss of certainty that is inherent in the adoption of a limitation regime dependent on the date of knowledge of the relevant facts by the plaintiff. It has been suggested that this is particularly important in the case of those causes of actions that were

⁹ Law Reform Committee of Parliament *Twentieth Report: Interim Report on Limitation of Actions in Personal Injuries Claims* (Cmnd. 5630, 1975) at paragraph 36.

¹⁰ New Zealand Law Commission *Tidying the Limitation Act* (NZLC R 61, July 2000) at paragraph 6.

¹¹ *Ibid* at paragraph 5.

previously subject to a limitation period starting from a fixed point, i.e. the date of accrual.¹²

(2) Disadvantages of an Ultimate Limitation Period

5.12 Ultimate limitation periods are open to the criticism that they will either “too long to serve any very useful purpose in the majority of cases or too short to cover those cases with which we are particularly concerned, namely insidious diseases.”¹³ It has been argued that even a 30-year ultimate limitation period might be too short to safeguard plaintiffs’ interests in personal injuries cases in particular, especially in cases involving diseases that have a very long latency period.¹⁴

5.13 Ultimate limitation periods generally apply irrespective of whether or not a cause of action has accrued, or is discoverable. It is at a minimum arguable that if a plaintiff’s right of action expires before it is possible to discover the existence of damage, the rights given to such persons by the law are illusory.¹⁵ The introduction of an ultimate limitation period may, therefore, be unfavourable towards plaintiffs who have not yet discovered a meritorious cause of action.

5.14 Furthermore, the Commission has previously recognised that if an ultimate limitation period of X years is introduced, producers may be able to design a product with a planned obsolescence of (X + 1) years, thereby defeating the purpose of the ultimate limitation period.¹⁶

(3) Provisional Recommendation

5.15 The Commission considers that the advantages of introducing an ultimate limitation period by far outweigh the disadvantages and therefore recommends the introduction of an ultimate limitation period of general

¹² Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 67.

¹³ Law Reform Committee of Parliament *Twentieth Report: Interim Report on Limitation of Actions in Personal Injuries Claims* (Cmnd. 5630, 1975) at paragraph 37.

¹⁴ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraph 5.67.

¹⁵ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraph 5.72.

¹⁶ Law Reform Commission *Consultation Paper on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injuries)* (1998) at 77.

application. The Commission considers that this would fulfil the need for the law of limitations in Ireland to be imbued with flexibility.

5.16 *The Commission provisionally recommends the introduction of an ultimate limitation period of general application.*

C Previous Recommendations

5.17 The Commission has, on a number of occasions, had the opportunity to consider the introduction of an ultimate limitation period and has previously recommended the introduction of such a period for latent damages actions (excluding personal injuries) but not for actions in respect of defective premises and latent personal injuries.

(1) Actions in respect of Defective Premises

5.18 In 1982, the Commission recommended against the introduction of an ultimate limitation period for actions in respect of defective premises. A submission was made to the Commission that no action should lie after a period of ten years had elapsed from the date of doing the work. The Commission took account of that submission but reached the following view:-

“[T]he importance of protecting defendants from stale or dilatory claims was, in the Commission’s view, outweighed by the injustice of denying to a plaintiff a right of action for injury or damage just because that injury or damage had not manifested itself within a given period.”¹⁷

(2) Personal Injuries Actions

5.19 In 1987, the Commission opposed the introduction of an ultimate limitation period for latent personal injuries actions.¹⁸ The Commission noted that there was considerable debate as to the merits and disadvantages of the ten-year ultimate limitation period introduced under the *Liability for Defective Products Act 1991*, and acknowledged that the insurance industry would understandably welcome a long-stop as this would enable them to close their books on particular claims.¹⁹ It was concluded however that the objective of the Commission’s recommendations as to the limitation of actions in respect of latent personal injury – i.e. the prevention of injustice through the introduction of

¹⁷ Law Reform Commission *Report on Defective Premises* (LRC 3-1982) at 9. This recommendation was made in the context of the Commission’s recommendation that the limitation period for actions in respect of defective premises should run only from the plaintiff’s date of knowledge. *Ibid* at 8-9.

¹⁸ Law Reform Commission *Report on The Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC-21, 1987) at 46-47.

¹⁹ *Ibid* at 47.

a date of knowledge test – could, in some cases at least, be frustrated if an ultimate limitation period was introduced and, moreover, that:-

“[H]owever long or short the “long stop” period ultimately settled on may be, it must of its nature be crude and arbitrary and have no regard to the requirements of justice as they arise in individual cases.”²⁰

5.20 Citing the Supreme Court decision of *Ó Domhnaill v Merrick*,²¹ the Commission considered it sufficient that the courts have an inherent jurisdiction to strike out proceedings where there is inordinate and inexcusable delay, even where the limitation period has not yet expired.²²

(3) Actions founded in Tort & Contract (excluding personal injuries)

5.21 In 1998, the Commission provisionally recommended the introduction of a 15-year ultimate limitation period for actions in contract and tort other than personal injuries actions.²³ The Commission was satisfied that such a provision would withstand constitutional challenge.²⁴ We expressed the view that:-

“A ‘long-stop’ which would counterbalance the [proposed] discoverability provision would ensure that the constitutional rights of plaintiff and defendant are upheld equally.”²⁵

5.22 The Commission acknowledged that no ultimate limitation period applied to personal injuries actions under the *Statute of Limitations (Amendment) Act 1991*, but the following view was expressed:-

“We are nevertheless of the view that such a distinction can be justified on the basis that in cases of personal injury, the right of the plaintiff should be ascribed a greater weight than that of the defendant, at least as an initial point of departure.”²⁶

²⁰ *Ibid* at 48.

²¹ [1984] IR 151.

²² Law Reform Commission *Report on The Statute of Limitations: Claims in respect of Latent Personal Injuries* (LRC 21-1987) at 48.

²³ Law Reform Commission *Consultation Paper on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injuries)* (1998) at 79.

²⁴ *Ibid* at 77.

²⁵ *Ibid* at 77.

²⁶ *Ibid* at 78.

5.23 This recommendation was affirmed in the Report published on the same topic in 2001, in which the Commission suggested that an ultimate limitation period should be introduced for actions claiming damages for breach of duty whether the breach occurs in tort, contract, statute or independent of any such provision (with the exception of libel, slander or injurious falsehood).²⁷ The Commission recommended that the long-stop should last for 10 years for such actions, running in general from the date of accrual of the cause of action.²⁸ In addition, the Commission suggested that special rules should be introduced to govern the starting date for the long-stop limitation period in construction liability cases.²⁹ This recommendation has not been implemented.

(4) Actions in respect of Non-Sexual Child Abuse

5.24 When considering the limitation of actions arising out of non-sexual child abuse, the Commission considered – among other options - the introduction of a long, fixed limitation period commencing from the age of majority within which plaintiffs could initiate proceedings in respect of abuse suffered by them as a child.³⁰ It might be said that this option would be similar to the introduction of an ultimate limitation period beyond which no claims could be commenced.

5.25 The Commission acknowledged that this option would import clarity and certainty into the law in this area. The following advantage was identified:

“While the abolition of limitation periods would leave defendants subject to open-ended claims, this model would provide defendants with ascertainable and clear protection against stale claims. From the point of view of fairness to the defendants, such a limitation would mean that they would be exposed to a lesser risk of open-ended claims and the problem of stale evidence.”³¹

5.26 As seen above, the Commission invited submissions as to whether either of the following limitation periods should be adopted:

²⁷ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC-64, 2001). at paragraph 2.40.

²⁸ *Ibid* at paragraph 4.21. This would be comparable, though not identical, to section 14A(B), English *Limitation Act 1980* (c.58), inserted by the English *Latent Damage Act 1986* (c.37).

²⁹ *Ibid* at chapter 6.

³⁰ Law Reform Commission *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC-CP16-2000) at 64.

³¹ *Ibid* at 65.

- (i) A fixed limitation period of 12 years, subject to extension by the courts for up to three years, running from the age of majority; or
- (ii) A fixed limitation period of 15 years, running from the age of majority.³²

D Appropriate Length of the Ultimate Limitation Period

5.27 The period chosen for the ultimate limitation period must be sufficiently long to ensure that it does not rule out deserving claims that have not yet, for example, become discoverable. It must balance the needs of the plaintiff, the defendant and society as a whole. Economic considerations, such as insurance costs, must be taken into account and the length of time chosen must be reasonable and effective.

5.28 In general, the ultimate limitation periods enacted in other jurisdictions have been of 10, 15 or 30 years' duration. The following are some examples:

JURISDICTION	APPLICATION	LENGTH
Alberta	<i>Civil actions, generally</i>	10 years ³³
Australian Capital Territory	<i>Latent Damage</i>	15 years ³⁴
British Columbia	<i>Civil actions, generally</i>	30 years ³⁵
	<i>Certain actions against medical professionals</i>	6 years ³⁶
England and Wales	<i>Latent Damage</i>	15 years ³⁷

³² *Ibid* at 66-68.

³³ Section 3(1)(b), *Limitation Act* RSA 2000, c.L-12.

³⁴ Section 40, *Limitation Act 1985* (No 66); Republication No. 16 of April 12 2007.

³⁵ Section 8(1)(c), *Limitation Act* RSBC 1996, c.266. But see Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990); British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002).

³⁶ Section 8(1)(a) and (b), *Limitation Act* RSBC 1996, c.266.

³⁷ Section 14B(1), *Limitation Act 1980* (c.58).

	<i>Defective products</i>	10 years ³⁸
Manitoba	<i>Civil actions, generally</i>	30 years ³⁹
New South Wales	<i>Civil actions, generally</i>	30 years ⁴⁰
	<i>Personal Injuries</i>	12 years (+ 3) ⁴¹
New Zealand (proposed)	<i>Civil actions, generally</i>	15 years ⁴²
Ontario	<i>Civil actions, generally</i>	15 years ⁴³
Saskatchewan	<i>Civil actions, generally</i>	15 years ⁴⁴
ULCC	<i>Civil actions, generally</i>	15 years ⁴⁵
Western Australia	<i>Civil actions, generally</i>	30 years ⁴⁶

5.29 There has been a gradual trend of reduction of the length of the ultimate limitation period from 30 years to 10 or 15 years.⁴⁷

³⁸ *Ibid* at section 11A(3).

³⁹ Section 14(4), *Limitation of Actions Act* CCSM, c. L150.

⁴⁰ Section 50C(1)(b), *Limitation Act 1969* (No. 31), Reprint No. 8. The 12-year long-stop limitation period is subject to extension under section 62A of the Act.

⁴¹ Section 51, *Limitation Act 1969* (No. 31), Reprint No. 8.

⁴² See Clause 8, New Zealand Law Commission *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

⁴³ Section 15(2), *Limitations Act* SO 2002, c.24, Schedule B. But see the proposals made by the Ontario Limitations Act Consultation Group in its *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991). The Group recommended that the long-stop should vary in length according to the nature of the case: a 30-year long-stop would generally apply, running from the date on which the act of omission took place, but in exceptional cases (involving health facilities, health practitioners, and improvements to real property carried out under a contract), a 10-year long-stop would apply.

⁴⁴ Section 7(1), *Limitations Act* S.S. 2004 c.L-16.1, as amended by S.S. 2007, c.28.

⁴⁵ Section 6, ULCC *Uniform Limitations Act* (adopted 2005).

⁴⁶ Section 36(3), *Limitation Act 2005* (No. 19).

(1) 10 years?

5.30 In 1986, the Alberta Institute recommended the introduction of an ultimate limitation period of ten years “after the claim arose”. This recommendation was based on the following analysis:

“Within ten years after the occurrence of the events on which the overwhelming majority of claims are based, these claims will have been either abandoned, settled, litigated or become subject to a limitations defence under the discovery rule. The class of remaining potential claimants will have become very small [...]”⁴⁸

5.31 The Institute considered that the reasons for a limitations system “based only on peace and repose, and economics” would justify an ultimate limitation period of ten years.⁴⁹ In addition, the Institute was influenced by the cost burden on potential defendants and, through them, on society as a whole.⁵⁰ The Institute also considered the evidentiary reasons for a limitations system, and in that regard observed as follows:

“By the time that ten years have passed after the occurrence of the events on which a claim is based, we believe that the evidence of the true facts will have so deteriorated that it will not be sufficiently complete and reliable to support a fair judicial decision. Adjudication under these circumstances can only detract from the credibility of the judicial system, and undermine its effectiveness.”⁵¹

5.32 Notwithstanding these considerations, the Institute altered its view in the period intervening between 1986 and 1989 and an ultimate period of 15 years was proposed in the Institute’s *Model Limitations Act*. By this date, the Institute considered that “a 10-year period is too short and would operate unfairly against claimants.”⁵² The current Alberta *Limitations Act* followed the

⁴⁷ Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990).

⁴⁸ Alberta Institute for Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at 156.

⁴⁹ Alberta Institute for Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at 156.

⁵⁰ *Ibid* at 156.

⁵¹ *Ibid* at 156.

⁵² Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 35.

Institute's earlier recommendations, however - it contains a 10-year ultimate limitation period.⁵³

5.33 The Law Reform Commission of Western Australia in 1997 expressed the view that 10 years is too short a period to represent a satisfactory adjustment of the competing rights of the parties, particularly where defective buildings are involved. That Commission was of the view that in such cases, the plaintiff can legitimately expect that the property he has paid for should last longer than 10 years before it begins to fall down. It also stated that this rationale might also be applied to professional negligence cases, where the client should be able to expect that the advice given would prevent him from suffering loss either immediately or in the future.⁵⁴

5.34 The New Zealand Law Commission (NZLC) in 2001 recommended the introduction of a 10-year ultimate limitation period, running from the date of accrual. The NZLC stressed that "[a]rriving at an appropriate long-stop date cannot be a matter of exactitude." It based its choice on the period then applicable under buildings legislation and proposed the following definition of the date of accrual, to avoid confusion:

"[...] the date when all facts necessary to establish the claim are in existence whether or not their existence is known to the plaintiff."⁵⁵

5.35 The NZLC has, however, since changed its recommendation a 15-year ultimate limitation period, for reasons discussed at page 233 below.

5.36 The British Columbia Law Institute ("BCLI") in 2002 recommended the introduction of a 10-year ultimate limitation period ("ULP") based on the following assertions:

"A 10 year ULP would [...] ensure that the right to litigate is cut off at a point where the costs to defendants outweigh the potential prejudice to a small number of claimants who may lose the right to seek relief through the courts. Few claimants would be affected by the reduction in time as it appears that the vast majority of actions, including latent damage claims, are brought within 10 years of the occurrence that gives rise to the claim."⁵⁶

⁵³ Section 3(1), *Limitations Act* RSA 2000, c.L-12.

⁵⁴ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997), at paragraph 5.72.

⁵⁵ New Zealand Law Commission *Tidying the Limitation Act* (NZLC R 61, July 2000) at paragraphs 13-14.

⁵⁶ British Columbia Law Institute *Report on the Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 8.

5.37 The BCLI considered that a 10-year period would “*create greater certainty in limitations law and provide a reasonable balance between the interests of plaintiffs, defendants and society.*”⁵⁷ It noted that few reported cases had arisen where the gap between the occurrence of the material elements of the claim and the start of an action was significantly longer than ten years.⁵⁸

5.38 The Law Commission for England and Wales has also recommended the introduction of a 10-year ultimate limitation period. It provisionally recommended that personal injuries and fatal injuries actions should be subject to a 30-year ultimate limitation period⁵⁹ but this was rejected by a majority of consultees.⁶⁰ Its deliberations are discussed in more detail at page 246 below.

(2) 12 years?

5.39 The majority of land actions are currently subject to a 12-year limitation period. This length therefore has the benefit of familiarity. Moreover, the introduction of a 12-year ultimate limitation period would obviate the need to bring in a separate period for land actions.⁶¹

5.40 As noted above, the legislature of Alberta rejected the 15-year period that was recommended in the Alberta Institute in its *Model Limitations Act 1989*. A 12-year ultimate period was first considered by the legislature, but this was reduced to ten years during caucus review.⁶² The ten-year period adopted was in accordance with the original recommendation of the Alberta Institute in 1986.⁶³

⁵⁷ *Ibid* at 8.

⁵⁸ *Ibid* at fn15.

⁵⁹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at paragraphs 12.97 - 12.113.

⁶⁰ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 67-68.

⁶¹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 290.

⁶² See Law Reform Commission of Western Australia's *Report on Limitation and Notice of Actions* (Project 36(II), 1997) at paragraph 6.17, fn 43, citing a letter from Professor P J M Lown QC of the Alberta Law Reform Institute, dated 6 December 1996, on file at that Commission.

⁶³ Alberta Institute for Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraphs 2.197-2.198.

(3) 15 years?

5.41 The New Zealand Law Commission (NZLC) in 2007 recommended the introduction of a 15-year ultimate limitation period.⁶⁴ It was particularly influenced by the adoption of 15 years as the appropriate ultimate period by the Scarman Committee Report in 1984.⁶⁵ The NZLC suggested that the a 15-year ultimate period would reduce costs for business by providing greater certainty as to when their liability was likely to end, and by providing an opportunity for those persons to then ‘move on’. It further considered that the long-stop period would allow appropriate insurance cover to be taken.⁶⁶

5.42 A 15-year ultimate limitation period has been recommended by the Law Reform Commission of Australia⁶⁷ and the Uniform Law Conference of Canada.⁶⁸ A 15-year period has been introduced in Ontario⁶⁹ and Saskatchewan.⁷⁰ This is in accordance with the recommendations contained in the *Alberta Model Limitations Act 1989* - though this was not adopted in Alberta.

5.43 In its 1998 Consultation Paper on *Limitations*, the Law Commission for England and Wales expressed concern that a 15-year limitation period would risk serious injustice to plaintiff suffering from diseases that carry long latency periods, and plaintiffs who suffered from sexual abuse as children. It acknowledged that even a longer period than 15 years would not always protect plaintiffs, but asserted that “a line has to be drawn somewhere” and recommended the introduction of a special, 30-year long-stop for personal injuries actions.⁷¹ This recommendation was not, however, carried forward at

⁶⁴ Clauses 8 and 22, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

⁶⁵ New Zealand Law Commission *Report No. 6, Limitation Defences in Civil Proceedings* (NZLC R6, October 31 1988), at paragraphs 295-302; Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (Cmnd 9390, 1984).

⁶⁶ New Zealand Law Commission *Regulatory Impact Statement*, in *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007), at 27.

⁶⁷ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraphs 7.30 and 7.54.

⁶⁸ This represents a reduction from 30 years in the ULCC *Uniform Limitation Act 1982*. Personal injuries claims and professional negligence claims, among others, were, however, subject to a 10-year ULP.

⁶⁹ Section 7(1), *Limitations Act SS 2004* (c. L-16.1).

⁷⁰ *Ibid* at section 7(1).

⁷¹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 290-291.

the Report stage, when it was recommended that no limitation period should apply to personal injuries cases.⁷²

(4) 30 years?

5.44 A 30-year ultimate limitation period applies to most claims in British Columbia.⁷³ This was first introduced in 1975.⁷⁴ The rationale behind the adoption of a relatively lengthy ultimate period was that such a period would be sufficient to accommodate latent damage claims and it would not expire until at least a decade after the age of majority was attained. This would prevent any prejudice to plaintiffs who were minors at the time of the occurrence of the material facts giving rise to the claim. Further, the 30-year period would allow a creditor to take advantage of successive confirmations.⁷⁵

5.45 Piecemeal changes have been made to the 30-year ultimate limitation period since 1975. A six-year ultimate limitation period has been introduced for claims against medical practitioners, hospitals and hospital employees.⁷⁶ A 10-year ultimate limitation period will apply to actions against a dentist based on professional negligence or malpractice, once the relevant section is commenced.⁷⁷ The British Columbia Law Reform Commission in 1990 recommended the reduction of the 30-year period to 10 years, which it considered would not in practice bar many meritorious claims.⁷⁸ Its successor - the British Columbia Law Institute ("BCLI") - reiterated this recommendation in 2001, stating that the 30-year period is "far too long"⁷⁹ and has a negative

⁷² Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraphs 3.99 – 3.113.

⁷³ Section 8(1)(c), *Limitations Act* RSBC 1996 (c.266), updated to January 2007. A six-year limitation period applies to certain claims against hospitals and medical practitioners. See sections 8(1)(a) and (b) of the Act.

⁷⁴ See *Limitations Act* SBC 1975, c. 37. A limited outer bar had existed under the *Statute of Limitations* RSBC 1960, c.370, which provided that no action by a person under disability could be brought beyond 40 years for the recovery of land.

⁷⁵ Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (Report No. 112, March 1990) at 13.

⁷⁶ Sections 8(1)(a) and (b), *Limitations Act* RSBC 1996 (c.266).

⁷⁷ Section 20, *Miscellaneous Statutes Amendment Act (No. 2) 2000* SBC 2000, c. 26, s.20. (To come into force by regulation under section 72(1) of that Act.)

⁷⁸ Law Reform Commission of British Columbia *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (LRC 112, 1990) at 31.

⁷⁹ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 6.

impact on defendants, professionals, clients, the commercial sector and the courts system. With respect to its impact upon defendants, the BCLI observed as follows:

“Due to its long duration the ULP has little practical effect with regard to protecting defendants from stale claims. It allows too much time to pass before proceedings are instituted, making it difficult for defendants to assemble evidence and witnesses.”⁸⁰

5.46 With regard to the impact of the 30-year ultimate limitation period on professionals and in turn on their clients, the BCLI noted:

“The 30 year ULP imposes significant expenses on defendants with regard to maintaining records, evidence and insurance until the period has been exhausted. Higher costs in the provision of goods and services form part of the overhead that are typically passed on to clients through increased prices. [...] In some cases access to protective insurance is elusive as a professional person may be susceptible to liability long after retirement, but may not be able to obtain insurance coverage or may only be able to do so at great expense.”⁸¹

5.47 The BCLI also observed that the 30-year ultimate limitation period has an adverse economic effecting, owing to prolonged liability, with respect to the commercial sector as a whole:

“The fact that matters cannot be treated as at a close until the 30 year period is extinguished creates an element of uncertainty about potential future financial costs. As a result defendants may be unwilling to enter into long-term arrangements and future transactions.”⁸²

5.48 As to its impact on the courts system, the BCLI noted:

“[I]n those cases where stale claims arise under the general ULP courts must expend valuable time and resources determining long past disputes. The passage of time also affects the ability of the court to determine a claim fairly. Unduly long limitation periods give rise to poor decisions, which diminish confidence in the judicial system.”⁸³

⁸⁰ *Ibid* at 6.

⁸¹ British Columbia Law Institute *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, July 2002) at 7.

⁸² *Ibid* at 7.

⁸³ *Ibid* at 7.

5.49 The BCLI ultimately concluded that the 30-year period weakens the limitations system.⁸⁴ A ten-year ultimate period was recommended, in its place.

5.50 The Alberta Institute in 1986 acknowledged that the 30-year period was most likely chosen as a result of “*sensitivity to the plight of meritorious claims*”, but considered that this did not give proper weight to the interests of defendants.⁸⁵

5.51 As seen above, in its recent project on *Limitations*, the Law Commission for England and Wales provisionally recommended a 30-year limitation period for personal injuries actions. This recommendation was not, however, carried forward at the Report stage. The following concerns influenced the Law Commission’s final decision on the matter:-

“The major concern at the suggestion that a longstop should apply to personal injury claims was that this would be unjust to claimants suffering from latent diseases, where the disease in question does not manifest itself within the long-stop period.[...] Some consultees also expressed concern that imposing a long-stop in personal injury cases could unjustifiably bar claims being made by victims of sexual abuse.”⁸⁶

5.52 The Law Commission finally recommended that no long-stop period should apply to such actions, stating as follows:-

“Increasing the length of the long-stop would not guarantee that all claimants with latent disease claims are covered, while making the long-stop too long to serve any useful purpose.”⁸⁷

(5) Previous Recommendations (10 or 15 years)

5.53 In a Consultation Paper published in 1998 on the limitation of non-personal injury actions, this Commission recommended that the proposed ultimate limitation period should run for 15 years.⁸⁸ This recommendation was the result of the following view:-

⁸⁴ *Ibid* at 7.

⁸⁵ Alberta Institute for Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at paragraph 2.198.

⁸⁶ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 67-68.

⁸⁷ *Ibid* at 69-70.

⁸⁸ Law Reform Commission *Consultation Paper on The Statutes of Limitation: Claims in Tort and Contract in Respect of Latent Damage (Other Than Personal Injury)* (LRC, November 1998) at 79.

“[A] period of ten years is insufficient to cover many buildings cases, and in cases of professional advice, such as where a defective will or conveyance is at issue, the period is certainly too short.”⁸⁹

5.54 The provisional recommendation was also influenced by the fact that a 15-year period applied under the English *Latent Damage Act 1986*.⁹⁰

5.55 Following consultation, however, the Commission altered its recommendation in favour of the introduction of a 10-year long-stop, running from the date of accrual.⁹¹ The change followed the receipt of strong recommendations made at a colloquium on the limitation of latent damages actions, that the ultimate limitation period should *not* be 15 years long, based on the evidentiary difficulties experienced after a long lapse of time, and increased insurance costs.⁹² The Commission was also influenced by the fact that in general, records must be kept only for six years and professional indemnity insurance must be maintained only for a run off period of six years.⁹³ Studies carried out in Ireland, Germany and France indicated that the majority of latent defects manifest themselves within 10 years after accrual.⁹⁴ The Commission concluded that a 10 or 12 year ultimate limitation period would be appropriate for actions in respect of latent damages.⁹⁵ This was consistent with a trend in the construction industry to take out 10-year insurance cover, the 10-year long-stop under the *Liability for Defective Products Act 1991*, and the 10-year liability period under the Irish HomeBond scheme.

(6) Provisional Recommendation

5.56 The Commission notes that the following are the most frequently adopted lengths for ultimate limitation periods:-

- i) 10 years,
- ii) 12 years,
- iii) 15 years, or

⁸⁹ *Ibid* at 79.

⁹⁰ *Ibid* at 78.

⁹¹ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 4.21.

⁹² *Ibid* at paragraph 4.14.

⁹³ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 4.07.

⁹⁴ *Ibid* at paragraph 4.14.

⁹⁵ *Ibid* at paragraph 4.15.

iv) 30 years.

5.57 Bearing in mind the guiding principles set out earlier in this Paper, the Commission is of the provisional view that a period of twelve years would be the most appropriate for an ultimate limitation period. There is a broad familiarity with the twelve-year period owing to its applicability in the guise of adverse possession to actions to recover land. The Commission is mindful that the length of the ultimate limitation period should not be so long as to allow for the fair trial rights of the defendant to be diminished. It is considered that there is, in many cases, a hidden injustice in allowing trials to proceed more than twelve years after the date of the act or omission giving rise to the cause of action.

5.58 *The Commission provisionally recommends the introduction of an ultimate limitation period of general application of 12 years' duration.*

E Appropriate Starting Point of the Ultimate Limitation Period

5.59 The following is a series of examples of the dates from which the ultimate limitation period runs in other jurisdictions.

JURISDICTION	RUNNING FROM:
Alberta	Date on which the claim arose.
Australian Capital Territory <i>Latent Damage</i>	Date of the act or omission that gave rise to the cause of action.
British Columbia	Date on which the action arose.
England and Wales <i>Latent Damage</i>	Date of the last act or omission of negligence.
England and Wales <i>Defective products</i>	Date on which product was last supplied. ⁹⁶
Manitoba	Date of the acts or omissions that gave rise to the cause of action.

⁹⁶ The "relevant" time is the date from which the product in question was last supplied by someone to whom section 2(2) of the 1987 Act applies, namely any person who is the producer of the product in question or who has held himself out as the producer by applying his own distinguishing mark to it or who has imported the product into the EU from outside the EU. Section 11A(3), *Limitation Act 1980*.

New South Wales	Date on which the limitation period ran.
New South Wales <i>Personal Injuries</i>	Date of the act or omission that gave rise to the cause of action.
Ontario	Day on which the act or omission on which the claim is based took place
Saskatchewan	Day on which the act or omission on which the claim is based took place.
ULCC 2005	Date of the act or omission that gave rise to the cause of action.
Western Australia	Date of Accrual
New Zealand (LRC)	Date of the act or omission in question.

5.60 It has been considered that the adoption of the same starting point for the calculation of all limitation periods (i.e. basic and ultimate) would lead to “greater certainty for everyone”, and would provide a “common standard for all other claims.”⁹⁷ Arguably, that this would encourage plaintiffs to be vigilant and not to sit on their rights, waiting for their claim to mature. Additionally, it would emphasise that the discovery principle exists for exceptional cases.⁹⁸

(1) Selected Models for Reform

5.61 The following models may be considered:

- i) Alberta
- ii) New Zealand
- iii) England and Wales
- iv) Ontario
- v) British Columbia

⁹⁷ Ontario Limitations Act Consultation Group *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991) at 22.

⁹⁸ *Ibid* at 22.

(a) Alberta (1986): Date on which the Claim Arose

5.62 In its 1986 Report, the Alberta Institute recommended that the ultimate limitation period should generally run from the date of accrual of the relevant cause of action.⁹⁹ It phrased its recommendation, however, so that the starting point is the date on which the claim arose.¹⁰⁰

5.63 At first glance, it may be thought that the “date of accrual” and the “date on which the claim arose” are effectively the same. There is, however, an important distinction between the ways in which these two starting points work. The Institute was conscious that the accrual rule is “unsatisfactory” in some cases and that in others its uncertainty produces problems. It observed that these difficulties would be “greatly diminished in practice” with the introduction of a general discoverability rule, and the introduction of special rules governing the date on which a claim is deemed to ‘*arise*’ in respect of certain types of claims where the accrual rule has been “particularly troublesome” in the context of limitations law.¹⁰¹ Special rules were formulated for the following actions:¹⁰²

- (i) Claims resulting from a continuing course of conduct or a series of related acts;
- (ii) Claims based on a breach of the duty of care;
- (iii) Fatal injuries actions;
- (iv) Claims based on a demand obligation;
- (v) Claims for contribution.

5.64 The Institute was clear in its recommendation that the special rules proposed should not affect the general law with respect to accrual. Rather, those rules should apply only to the starting point of the ultimate limitation period, i.e. the “date on which the claim arose”. Thus, the rules governing the “date on which the claim arose” for the actions discussed below are not the same as the rules governing the accrual of those actions, and therein lies the distinction between the “date of accrual” and the “date on which the claim arose”.

⁹⁹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 155.

¹⁰⁰ *Ibid* at 157.

¹⁰¹ *Ibid* at 158-169.

¹⁰² See Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 158-169; Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 69-74.

5.65 There follows a discussion of the special rules proposed with respect to the five categories of claim that the Institute identified as posing particular problems under the accrual rule.

(i) Continuing Course of Conduct / Series of Acts

5.66 Problems arise with respect to actions based on a continuing course of conduct, or a series of acts of omissions. For example, in cases where there have been successive acts of negligence, each separate act will result in the ultimate limitation period beginning to run again at a date after the original act of negligence.

5.67 This Alberta Institute considered the question to be as follows:-¹⁰³

“Insofar as the objectives of limitations law are concerned, it doesn’t matter how many breaches of duty there were, how many different duties were breached, how many claims there are, or when they accrued, if the claims all resulted from a continuing course of conduct or a series of related acts or omissions. In this situation the policy issue is when should the ultimate period begin: then the legally wrongful conduct began or when it ended.”

5.68 The Institute ultimately recommended that the ultimate period should run from the date on which the conduct ended;¹⁰⁴ or, phrased differently, “when the conduct terminated or the last act or omission occurred.”¹⁰⁵ In the legislation that arose from the Institute’s recommendations, the ultimate limitation period runs from the date on which the claim arose. That date is defined so that claims that are based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, are deemed to ‘arise’ when the conduct terminates or the last act or omission occurs.¹⁰⁶

(ii) Breach of Duty

5.69 Under the common law rules governing accrual, actions based on a breach of duty do not accrue until damage is suffered by the plaintiff, because actions for breach of duty are not actionable *per se* but, rather, require proof of actual damage.

5.70 The Alberta Institute in 1986 addressed the problems associated with the accrual test for claims involving damage, or what the Institute called ‘harm’,

¹⁰³ See Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 161.

¹⁰⁴ *Ibid* at 162.

¹⁰⁵ *Ibid* at 169.

¹⁰⁶ Sections 3(3)(a), *Limitations Act* RSA 2000, c.L-12.

including 'harm' by way of personal injury, property damage, economic loss, nominal damage, or otherwise. The Institute noted as follows:-

"With respect to harm, there is no functional reason consistent with limitations policy to distinguish between claims based on contract, tort, statute or duties of care based on any of the three."¹⁰⁷

5.71 It noted that a breach of duty will always require some conduct - whether an act or omission - on the part of the defendant. While the date on which the defendant's conduct occurs and the date on which damage is suffered frequently coincide, there have been many instances where those dates have been months, years or even decades apart. Moreover, the manifestation of that damage may not occur until a later date, still. The Institute noted that if the ultimate limitation period was not to begin running until the damage occurred, decades may have passed from the date of the defendant's conduct, and the ultimate period might not provide adequate protection to the defendant.¹⁰⁸

5.72 The Institute therefore recommended that the ultimate period for a claim based on a breach of a duty should begin to run when the defendant's careless / negligent conduct occurs, irrespective of whether the duty of care was based on contract, tort, statute, or otherwise. The Institute considered that this should apply in all cases where damage is a constituent element of the claim based on the breach of duty. It recognised that this meant that the ultimate period may begin to run at a time when the cause of action has not yet accrued or been discovered, as damage may not yet have occurred, but felt that it was necessary to run the ultimate period from this date in order to secure the objectives of securing report for the society of potential defendants.¹⁰⁹ The Institute was of the following view:-

"This problem of legal principle is inescapable because there is no feasible alternative consistent with limitations policy."¹¹⁰

5.73 In the legislation enacted following these recommendations, the ultimate limitation period runs from the date on which the claim arose, and claims based on a breach of duty are defined so as to 'arise' when the conduct,

¹⁰⁷ See Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 92.

¹⁰⁸ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 92-104.

¹⁰⁹ *Ibid* at 158-159.

¹¹⁰ Alberta Law Reform Institute *Limitations* (Report No. 55, 1989) at 70.

act or omission occurs.¹¹¹ Thus, a uniform approach applies where claims in tort and contract overlap.

(iii) Demand Obligations

5.74 Demand obligations (e.g. a promise to pay a debt on demand) are obligations for which there is no fixed time or specific conditions for performance. They often arise between friends and family where money is lent without the parties establishing terms for repayment. Repayment can, therefore, be required at any time after the loan is made.¹¹²

5.75 At common law, the running of the limitation period for a cause of action based on a demand obligation differs from the normal running of the limitation period. In normal circumstances, the date on which the limitation period starts to run is chosen with reference to the date on which a wrong occurred. This is not the case with demand obligations, however; the limitation period in such cases starts to run at the date on which the obligation was created - e.g. the date on which the loan was made.

5.76 The Alberta Institute recommended that the ultimate period for such claims should be to run when a default in performance occurred after a demand for performance was made.¹¹³ This recommendation was enacted and continues to apply today.¹¹⁴

(iv) Fatal Injuries Actions

5.77 The Alberta Institute in 1986 addressed the difficulties associated with the date of accrual in fatal injuries actions, and recommended that the ultimate limitation period should run from the date of the conduct which caused the death on which the claim is based. This recommendation was based on the same rationale as applied to those made in respect of breach of duty, discussed above, which the Institute phrased as follows:-¹¹⁵

“The problem is that, just as careless conduct may have occurred many years before it results in damage, and the possible accrual of a claim, so the conduct which eventually causes a death may have occurred

¹¹¹ Sections 3(3)(b), *Limitations Act* RSA 2000, c.L-12.

¹¹² British Columbia Law Institute *Report on the Ultimate Limitation Period: Updating the Limitations Act* (Report No. 19, 2002), at 26.

¹¹³ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 162.

¹¹⁴ Sections 3(3)(c), *Limitations Act* RSA 2000, c.L-12.

¹¹⁵ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 163.

more than a decade before the resulting death. If the ultimate period is to give meaningful protection to defendants, it must begin at the time of a defendant's conduct."

5.78 Under the legislation enacted following the Institute's recommendations, the ultimate limitation period for fatal injuries actions runs from the date on which the conduct that causes the death, on which the claim is based, occurs.¹¹⁶

(v) Claims for Contribution

5.79 A claim for contribution arises where damage or loss is caused by the tortious conduct of more than one person. The plaintiff (i.e. the person who has suffered the wrong) can recover damages from any one of the tortfeasors. The tortfeasor who is ordered to pay the entirety of the damages may then seek to recover from another tortfeasor, or multiple other tortfeasors, a contribution towards the payment of those damages.

5.80 The Alberta Institute acknowledged that the question of when the ultimate period for claims for contribution should begin to run raises "a complex and difficult issue".¹¹⁷ It identified three possible dates for the running of the ultimate limitation period against the claimant tortfeasor:-

- i) The date of accrual of the cause of action in respect of the wrong suffered by the plaintiff;
- ii) The date on which liability for the wrong suffered by the plaintiff is imposed on the claimant tortfeasor; or
- iii) The date on which the claimant tortfeasor was made a defendant under the claim upon which the claim for contribution could be based.¹¹⁸

5.81 The Institute considered that the first option was "unduly harsh" and the second would unnecessarily extend the operation of the ultimate period.¹¹⁹

5.82 It is evident that the third option is a date that will occur between dates (i) and (ii). This date has the weakness that the cause of action of the claimant tortfeasors against the other tortfeasors has not yet accrued at this date, because liability has not yet been imposed on the claimant tortfeasor in

¹¹⁶ Sections 3(3)(d), *Limitations Act* RSA 2000, c.L-12.

¹¹⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 164.

¹¹⁸ *Ibid* at 165-6.

¹¹⁹ *Ibid* at 168.

respect of the damages to be paid to the plaintiff. The Institute considered, however, that this weakness is mitigated by the fact that once the claimant tortfeasor is made a defendant in respect of a particular wrong alleged, the defendant has ample time to make investigations into whether or not there are other persons who might also be liable for the damage suffered by the plaintiff.¹²⁰ The Institute noted:-

“As a matter of practical reality this problem is more a matter of sound than fury. When any tort-feasor is made a defendant in a civil proceeding which originated with a tort claim, it is in his interest to make all reasonable efforts to discover all the other tort-feasors liable for the damages, to join them in the proceedings, and to bring claims for contribution as soon as possible.”¹²¹

5.83 The Institute ultimately recommended that the ultimate period for a claim for contribution should begin when the claimant for contribution was made a defendant under, or incurred liability through, the settlement of a claim seeking to impose liability upon which the claim for contribution could be based, whichever occurs first.¹²² This recommendation was enacted, and continues to apply today.¹²³

(b) New Zealand (1988): Date of the Defendant's Act or Omission

5.84 A limitations scheme based on the principle that both the basic and ultimate limitation periods should run from the date of the defendant's act or omission – rather than from the date of accrual - was first suggested by the New Zealand Law Commission (NZLC) in 1988.¹²⁴ Thus, focus would be centered on the defendant's conduct rather than on the date of accrual. The NZLC considered that this would make the starting point of the limitation periods must clearer than under the accrual rule.

5.85 The NZLC noted that in most cases, the date of the defendant's act or omission would be clear. In relation to contract, it would be the date of the breach – as is the case under the accrual rule. In other cases, the date of the defendant's act or omission may be earlier than the date of accrual. In negligence cases, for example, the date of the defendant's act or omission will

¹²⁰ *Ibid* at 167.

¹²¹ *Ibid* at 168.

¹²² Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986) at 169.

¹²³ Sections 3(3)(e), *Limitations Act* RSA 2000, c.L-12.

¹²⁴ New Zealand Law Commission *Limitation Defences in Civil Proceedings* (NZLC Report No. 6, 1988) at paragraph 128.

not necessarily coincide with the date on which damage is suffered or loss is incurred. In some cases, however, such as those where questions of status are involved, no limitation period will begin to run as no act or omission will occur.¹²⁵

5.86 The NZLC acknowledged that difficulties might arise with continuing acts or omissions, where several different starting points might be identifiable. It recommended special provisions for the following claims:-

- i) Claims based on demands;
- ii) Claims for conversion;
- iii) Claims for contribution;
- iv) Claims for indemnity;
- v) Certain intellectual property claims.

(c) *England and Wales (2001): Alternative Starting Points*

5.87 While acknowledging the problems associated with the accrual rule, the Law Commission for England and Wales has recommended that the ultimate limitation period should generally run from that date, with an alternative starting point for actions in tort and breach of statutory duty where loss is an essential element of the cause of action, namely the date of the act or omission giving rise to the cause of action.

5.88 In its 1998 Consultation Paper on the *Limitation of Actions*, the Law Commission provisionally recommended that the ultimate limitation period for *all* causes of action should run from the date of the act or omission giving rise to the cause of action. It acknowledged that the adoption of this starting point might result in hardship to plaintiffs where the damage was incurred at a time after the date of the act or omission. This may occur, for example, in cases involving major construction projects or where a disease is contracted as a result of employment.¹²⁶ Nevertheless, it considered that as the discoverability rule swings the balance in favour of the plaintiff, “the interests of defendants should be preferred over those of plaintiffs in fixing the starting point for the long-stop limitation period.”¹²⁷

5.89 In choosing this starting point, the Law Commission was influenced by the fact that the ultimate limitation period that currently applies in England and Wales for latent damage claims starts from the date of the act or omission

¹²⁵ *Ibid* at paragraph 169.

¹²⁶ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 288.

¹²⁷ *Ibid* at 289.

that is alleged to constitute negligence, and the ultimate period for actions under the *Consumer Protection Act 1987*¹²⁸ starts to run from the date of the act giving rise to the claim. It was also influenced by the fact that the accrual test could “reintroduce the incoherence and complexity caused by the different rules on the date of accrual for different causes of action.”¹²⁹ It further accepted that the use of the accrual test as the starting point of the ultimate period could destroy the purpose of the proposed ultimate limitation period as defendants would not be protected if the cause of action did not accrue until many years after the date of the act or omission giving rise to the cause of action.¹³⁰

5.90 At the Report stage, the Law Commission noted that a majority of consultees had supported its provisional recommendation, and it observed:

“The date of the act or omission giving rise to the cause of action has the advantage that it is easier to ascertain than the date on which the claimant suffers loss. The disadvantage is that in some cases loss is an essential element of the cause of action and there is therefore no cause of action until the claimant has suffered loss, which may be some time after the date of the act or omission giving rise to the cause of action.”¹³¹

5.91 The Law Commission was particularly worried about the difficulty in ascertaining the date of the act or omission “giving rise” to the cause of action where there have been a number of acts or omissions by the defendant. The Law Commission therefore recommended that in order to minimise these problems, the ultimate period should, in general, run from the date of the accrual of the cause of action. It expressed the following view as to this option:

“When loss is not an essential element of the cause of action, the date on which the cause of action accrues will in most cases be the date of

¹²⁸ The *Consumer Protection Act 1987* (c. 43) inserted section 11A into the *Limitation Act 1980*. That section deals with the limitation of actions in respect of defective products. It provides for a three year basic limitation period running from discoverability (as defined by section 11A (4) of the 1980 Act) and a ten year ultimate limitation period running from “the relevant time” (as defined by section 4(2) of the 1987 Act).

¹²⁹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 289.

¹³⁰ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 289.

¹³¹ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 70-71.

the act or omission which gives rise to the cause of action. The courts will, however, be able to draw on the guidance of the current law as to when a cause of action accrues to identify this date.”¹³²

5.92 The Law Commission acknowledged, however, that there would be difficulty in ascertaining the date of accrual for actions in tort and breach of statutory duty that are not actionable per se, i.e. where loss or damage is an essential element of the cause of action and it is necessary to identify exactly when a plaintiff has suffered injury, loss or damage in order to ascertain the date of accrual. To offset this difficulty, the Law Commission recommended that for causes of action in tort and breach of statutory duty where loss is an essential element of the cause of action, the ultimate period should run from the date of the act or omission giving rise to the cause of action.¹³³ This would mean that for such actions, loss or damage would not have to have occurred in order for the ultimate limitation period to begin running.

(i) What starting point for Construction Cases?

5.93 In its Consultation Paper, in the context of its provisional recommendation that the ultimate limitation period run from the date of the act or omission giving rise to the cause of action, the Law Commission asked consultees whether there should be a special starting point for the ultimate period in the case of construction-related claims. It suggested that in such cases, the date of the act or omission could be defined as the ‘date of completion’ of the construction works. This suggestion was based on an earlier recommendation of the Construction Industry Board¹³⁴

5.94 The Law Commission observed that in major construction projects, a negligent act that causes damage may take place a considerable time before the building work is completed. It will often be even longer before a plaintiff has the opportunity to uncover the damage. There may be hardship to the plaintiff if the ultimate period runs from the date of the negligent act rather than the date of accrual (i.e. the date on which the damage is incurred).¹³⁵ In England and Wales, there is a statutory duty to build dwellings properly.¹³⁶ The basic

¹³² *Ibid* at 70.

¹³³ *Ibid* at 70.

¹³⁴ See Construction Industry Board *Report from Working Group 10 on Liability Law* (1995) at paragraphs 51-58.

¹³⁵ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 288.

¹³⁶ See section 1(1), *Defective Premises Act 1972* (c. 35). The person must “see that the work which he takes on is done in a workmanlike or professional manner, with

limitation period for actions in respect of a breach of this duty accrues at the time when the dwelling was completed. If that person carries out further work after that time to rectify the work already done, actions in respect of the further work accrue at the time when the further work was finished.¹³⁷ The English Law Reform Committee in 1984 considered running an ultimate limitation period from the “completion date”, for latent damages actions, but it found that aside from construction claims, there would be “formidable difficulties” in adapting the concept of completion to all the types of circumstances where latent damage might arise.¹³⁸

5.95 The Law Commission acknowledged that the adoption of the “completion date” as the starting point for the running of the ultimate period would assist the plaintiff because in most cases the date of completion would be later than the date of the act or omission giving rise to the cause of action. Further, it would avoid the need to investigate precisely when the relevant act or omission took place. This would provide more certainty for the parties to the action.¹³⁹ The Law Commission agreed with the Law Revision Committee, however, that there would be problems of demarcation if a special limitation provision was introduced for a particular industry. Moreover, this would detract from the uniformity of the proposed core regime.¹⁴⁰

5.96 As seen above, the Law Commission ultimately recommended that the ultimate limitation period begin to run on the date of accrual. It noted that the arguments are “finely balanced” with respect to whether a separate starting point should be adopted for the ultimate limitation period in construction-related claims. In favour of the adoption of a separate starting point, it was said that this area is one in which a claimant is likely to have concurrent claims in contract and tort. If the ultimate period begins to run, as proposed, from the date of accrual, there may be different starting points for the concurrent actions. The Law Commission noted that this problem would be rectified if a separate

proper materials and so that as regards that work the dwelling will be fit for habitation when completed.” *Ibid.*

¹³⁷ Section 1(5), *Defective Premises Act 1972* (c. 35).

¹³⁸ Law Reform Committee *Twenty-Fourth Report (Latent Damage)* (Cmnd. 9390, 1984) at paragraph 4.12.

¹³⁹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 288-289.

¹⁴⁰ *Ibid* at 289.

starting point was provided for all construction related claims, and certainty would be increased.¹⁴¹

5.97 Against the adoption of a separate starting point, the Law Commission observed that consultees had argued that it would be wrong to “ring-fence” a particular industry, that the adoption of a separate starting date for construction-related claims was not a principled approach, and that it would risk creating anomalies. Moreover, the legal problems faced by the construction industry may be said to be common to the whole law. In addition, it may be difficult to ascertain the precise “completion date”, and the starting of the ultimate limitation period from such a date would involve a considerably extended liability for sub-contractors who work on a project at its earlier stages. Considerable hardship would, it was argued, be caused to the professionals involved, in terms of increased insurance costs.¹⁴²

5.98 The Law Commission ultimately stated that it was not convinced that a special rule should be adopted for the running of the ultimate limitation period in construction-related claims, given the added complexity that such a rule would entail.¹⁴³

(d) Ontario (2002): Day of Occurrence of the Act or Omission

5.99 Under the Ontario *Limitations Act 2002*, which came into force in 2004, an ultimate limitation period of 15 years was enacted, running from the day on which the act or omission on which the claim is based took place.¹⁴⁴

5.100 The “day of occurrence” – i.e. the date on which the relevant act or omission took place – is defined for certain claims, as follows:-

- (a) in the case of a continuous act or omission, the day on which the act or omission ceases;
- (b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;
- (c) in the case of a default in performing a demand obligation, the day on which the default occurs.¹⁴⁵

¹⁴¹ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 71.

¹⁴² *Ibid* at 71-72.

¹⁴³ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 72.

¹⁴⁴ Section 15(2), *Limitations Act* SO 2002, c.24, Schedule B.

5.101 Thus, it is clear that the Ontario model incorporates certain – but by no means all – of the recommendations made by the Alberta Institute, but most notably rejects the adoption of the date of accrual as the starting point, instead opting for the date of the act or omission.

(e) *British Columbia (2002): Date of the Act or Omission*

5.102 The ultimate limitation period that applies at present under the British Columbia *Limitation Act* runs from the date on which the claim arose, which is the date of accrual of the cause of action.¹⁴⁶ The British Columbia Law Institute (“BCLI”) noted in a report on the ultimate limitation period published in 2002 that the running of the ultimate period from the date of accrual creates a number of problems, and should be reconsidered.¹⁴⁷ The BCLI summarised recent trends in the running of the ultimate limitation period as follows:-

“The modern trend in limitation legislation is to move away from a single accrual rule in defining the running of time.[...] The focal point for reform has been to abrogate the accrual rule - at least in those cases where damage is an essential element of the cause of action - and look to the act or omission that constitutes a breach of duty giving rise to the cause of action.”¹⁴⁸

5.103 That proposal was based on the following analysis:-

“The advantages of this approach are threefold. It avoids the difficulties of having to determine when a plaintiff has suffered damage for those causes of action where damage is an essential element. Consequently, the maximum duration of the defendant’s liability is more easily ascertainable than under the accrual system and this creates greater certainty for the parties involved. The defendant is protected from stale claims in cases where the date of accrual occurs many years after the date of the act or omission that constitutes a breach of duty. Moreover, this date provides a common starting point for the ULP with regard to claims in both tort and contract.”¹⁴⁹

¹⁴⁵ *Ibid* at section 15(6).

¹⁴⁶ British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at 16.

¹⁴⁷ British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at 16.

¹⁴⁸ *Ibid* at 17.

¹⁴⁹ *Ibid* at 18.

5.104 The BCLI acknowledged that if the accrual rule is abandoned, time would run for cases where damage is an essential element of the cause of action before the plaintiff gains a legal right to commence the action. It remarked as follows:-

“The law has no difficulty in postponing the running of a limitation period to some time after the cause of action accrued, such as in the case of the limitation period applicable to minor plaintiffs. Whereas, to start time running at an earlier point raises this anomaly that a claim can be barred before damage is incurred.”¹⁵⁰

5.105 The BCLI was of the view, however, that such an anomaly is likely to occur only in a few cases, and that such likelihood must be weighed against the significant problems that arise under the accrual rule. It considered that to run the ultimate limitation period from the date of the act or omission that constitutes a breach of duty would bring “far greater certainty, predictability and simplicity to limitations law”. Moreover, it considered that in terms of general limitations strategy, to start the running of the ultimate period from that date would serve to counterbalance the uncertainty for defendants that may arise where the basis limitation period commences either from the date of accrual and/or the date of knowledge.¹⁵¹

(i) Demand Obligations

5.106 The BCLI also took the opportunity to recommend that the common law rules with regard to demand obligations be amended. It noted that the common law rules can be harsh in their application as they can result in a plaintiff finding himself statute-barred before repayment is demanded. It recommended that the basic limitation period should start to run when a default in performance occurs after a demand in performance is made. The BCLI considered that this would create a greater degree of fairness by linking the running of the limitation period to the existence of a wrong.¹⁵²

5.107 The BCLI acknowledged that the adoption of such a rule would mean that a plaintiff would be able to demand performance of a demand obligation many years after the demand obligation was created. It therefore recommended the adoption of a complementary ultimate limitation period, running for 30 years from the date of the creation of the demand obligation, in order to overcome this problem. The BCLI considered that this would ensure

¹⁵⁰ *Ibid* at 18.

¹⁵¹ British Columbia Law Institute *Report on The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19, 2002) at 18.

¹⁵² *Ibid* at 26.

finality to the period of liability and, at the same time, allow for loans that are intended to span many years.¹⁵³

(2) Provisional Recommendation (General)

5.108 The Commission considers that the date of accrual test causes many problems both in terms of its application and the difficulty that is involved in explaining and understanding the principle. We consider that if the ultimate limitation period were to run from the date of the act or omission giving rise to the cause of action, this would operate in a complementary manner to the running of the basic limitation period from the date of knowledge of the plaintiff. It would be entirely futile to also run the ultimate limitation period from the date of knowledge.

5.109 The Commission provisionally recommends that the ultimate limitation period should run from the act or omission giving rise to the cause of action.

F Application to Personal Injuries Actions

5.110 Various approaches have been taken to the application of ultimate limitation periods to personal injuries actions. The following is a selected overview of the different attitudes.

(1) The Orr Committee

5.111 The Orr Committee, writing in 1974, did not favour the introduction of a long-stop limitation period for actions in respect of latent personal injuries. The Committee felt that any ultimate limitation period would “either be too long to serve any very useful purpose in the majority of cases or too short to cover [...] insidious diseases.”¹⁵⁴

(2) Law Reform Commission of Western Australia (1997)

5.112 The Law Reform Commission (“LRC”) of Western Australia in 1997 observed that ultimate limitation periods are not generally favoured in personal injuries cases. This is so because of the following:-

“Even a 30-year long stop period might be too short to safeguard the interests of plaintiffs, especially in cases involving such diseases as asbestosis or mesothelioma, because such diseases have a very long latency period. Although defendants would be at risk of a claim for a very long period, the seriousness of the injury and the inability of the plaintiff to discover it until many years after exposure to the hazard

¹⁵³ *Ibid* at 27.

¹⁵⁴ Law Reform Committee *Interim Report on Limitations of Actions: Personal Injuries* (20th Report, Cmnd 5630, 1974) at paragraph 37.

require the law not to close off the possibility of bringing an action after some arbitrary period.”¹⁵⁵

5.113 The LRC set out an overview of the ultimate limitation provisions adopted in Australia, England and Wales, Canada and New Zealand, and found that it was only in exceptional cases that ultimate periods were applicable to personal injuries actions.¹⁵⁶

(3) Law Commission for England and Wales (1998/2001)

5.114 In its Consultation Paper on limitations, published in 1998, the Law Commission for England and Wales asserted that plaintiffs who have suffered personal injury merit special concern simply on the basis that personal injury is “a more extreme type of harm than property damage or economic loss.” The Law Commission provisionally recommended that there should be a special, 30-year ultimate period for personal injury actions. The Law Commission considered that one strategy for dealing with this issue would be to give the courts discretion to override the long-stop, but rejected this option on the grounds of the uncertainty and consequent wasted costs that it would involve.¹⁵⁷

5.115 During the consultation phase, the provisional recommendation of a 30-year ultimate period for personal injuries actions was rejected by roughly 55% of consultees.¹⁵⁸ Consultees were concerned that the application of an ultimate period to personal injuries actions would be unjust to claimants suffering from latent disease if the disease in question does not manifest itself until after the ultimate period has expired. Consultees considered that claims for asbestos-related disease present particular problems. The latency period for mesothelioma can be anything up to 60 years after exposure; indeed, the Law Commission received expert advice that the median latency period is over 30 years. It considered, therefore, that the adoption of a 3-year ultimate period would prevent most claimants suffering from mesothelioma from recovering damages. The Law Commission was particularly influenced by evidence that “the incidence of asbestos-related disease is increasing, and is expected to continue to do so for at least the next twenty-five years.”¹⁵⁹

¹⁵⁵ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36II, 1997) at paragraph 5.67.

¹⁵⁶ *Ibid* at paragraph 5.68-5.69.

¹⁵⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 287.

¹⁵⁸ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 67.

¹⁵⁹ *Ibid* at 68.

5.116 The Law Commission also noted that consultees had expressed concern that the application of an ultimate period to personal injuries actions could unjustifiably bar actions in respect of sexual abuse. It noted that there was, at that time, a growing number of actions being taken by persons who claimed to have suffered abuse in the 1970's and 1980's, who had not reported the abuse because to do so would revive traumatic memories. The Law Commission expressed the following view:-

“Victims of such abuse frequently need time to recover sufficiently from the trauma consequent upon the abuse to be able to contemplate bringing a claim against their abusers. It could also be argued that the public interest in protecting the defendant from stale claims, and in ensuring that there is an end to litigation, does not apply where the defendant has been guilty of sexual abuse (which could be considered to make the case for exempting such claims from the long-stop limitation period even stronger than is the case for other personal injury claims such as for asbestosis).”¹⁶⁰

5.117 The Law Commission therefore reached the conclusion that 30 years is too short a period for the ultimate limitation of personal injuries actions. It was of the view that to apply a longer ultimate period would not guarantee that all actions would be covered, and in any event would make the ultimate period “too long to serve any useful purpose”.¹⁶¹

5.118 The Law Commission considered – and rejected – the option of dis-applying the ultimate period for cases involving personal injury where the claimant was not diagnosed as suffering the relevant injury until a date less than three years before proceedings were issued. It acknowledged that this would protect personal injury claimants where the injury was not discoverable prior to the expiry of the ultimate period, leaving the claim to be governed only by the basic limitation period, running from discoverability. The Law Commission noted that this option attracted support from consultees who had expressed objections based on the long latency of asbestos-related claims.¹⁶²

5.119 The Law Commission concluded, however, that to dis-apply the ultimate period for such claims would be to increase the complexity of the core regime without necessarily providing any compensating advantages, particularly

¹⁶⁰ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 68.

¹⁶¹ *Ibid* at 68.

¹⁶² *Ibid* at 68-69.

in light of the Law Commission's revised proposals in relation to a judicial discretion to dis-apply the limitation period for personal injuries claims.¹⁶³

5.120 The Law Commission acknowledged that the absence of an ultimate limitation period had caused "significant difficulties", especially where the plaintiff was of unsound mind and, consequently, under an indefinite disability. In the absence of an ultimate period, such plaintiffs could bring an action many years – if not decades – after the events giving rise to the cause of action. It considered, however, that "these problems only affect a small number of personal injury claims."¹⁶⁴

(4) Scottish Law Commission (2007)

5.121 A somewhat different approach – though similar in its effect – has recently been adopted by the Scottish Law Commission. In its recent *Report on Personal Injuries Actions*, the Commission recommended that all personal injuries actions should be subject to a five-year limitation period. This limitation period would run either from

- (i) The date on which the injuries were sustained or, where the injury is attributable to a continuing act or omission, the date on which that act or omission ceased; or
- (ii) The date of knowledge as defined.¹⁶⁵

5.122 This was subject to the recommendation that judicial discretion to allow a time-barred action to go ahead should be retained, and should not be subject to a time-limit.¹⁶⁶ The Scottish Law Commission made this recommendation on foot of a consultation process that wielded very little support for temporally limiting the exercise of judicial discretion. It did acknowledge that the following difficulty with this recommendation:-

"A potential defendant can never be sure that no action can be raised in respect of a past incident after the expiry of a certain period of time. Even in the case of industrial diseases such as asbestosis and some sexual abuse cases, there will come a point in time where the injured party will have, or ought reasonable to have, all the necessary

¹⁶³ *Ibid* at 69.

¹⁶⁴ *Ibid* at 69.

¹⁶⁵ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at 64.

¹⁶⁶ *Ibid* at 39-42.

knowledge. Therefore, even where judicial discretion exists, there should come a time after which no proceedings can be instituted.”¹⁶⁷

5.123 Nevertheless, the Scottish Law Commission cited concerns raised by consultees that it was questionable whether temporally limiting the exercise of judicial discretion would provide increased certainty for the defendant, and that such limitation would merely be a further arbitrary control which could lead to the very injustice or unfairness that the provision of discretion sought to overcome. Moreover, it was argued that setting a temporal limit for the exercise of the discretion might in practice amount to a rebuttable presumption that an action brought within that time should be allowed to proceed. In addition, the courts are mandated to have regard to the reasons for the delay in instituting proceedings; this, in itself, imposes a limit in a practical sense.¹⁶⁸

(5) Provisional Recommendation (Personal Injuries)

5.124 The Commission notes that the following three options are available, and invites submissions as to the most appropriate option:-

- i) Application of the proposed general 12-year ultimate limitation period;
- ii) Application of a special 30-year ultimate limitation period; or
- iii) No ultimate limitation period.

5.125 The Commission considers that special considerations arise in respect of the application of an ultimate limitation period to personal injuries actions. History demonstrates that many forms of personal injuries lay dormant for years if not decades. The imposition of a strict ultimate limitation period to such actions may have harsh results for persons who do not become aware of their injuries until after the expiry of the limitation period. That notwithstanding, there is an underlying danger in allowing the prosecution of civil actions long years after the act or omission giving rise to the cause of action, especially in terms of a risk of unfairness to the defendant. It is recalled that the Courts retain an inherent jurisdiction to strike out claims for want of prosecution even where a statutory limitation period has not yet expired, and it is considered that this jurisdiction plays a role in ensuring that trials do not proceed simply because they are not statute-barred, where there is a risk of unfairness to the defendant.

5.126 *The Commission provisionally recommends that the ultimate limitation period should apply to personal injuries actions.*

¹⁶⁷ *Ibid* at 42.

¹⁶⁸ *Ibid* at 42.

CHAPTER 6 JUDICIAL DISCRETION

A Introduction

6.01 In this Chapter, the Commission assesses the merits and disadvantages that might arise if a discretion allowing the courts to extend or dis-apply limitation periods was introduced as a general feature of the Irish law of limitation.

6.02 In Part B, the Commission examines the evolving approach to such a discretion in a number of different jurisdictions, noting that there has been considerable movement in the approach taken to this issue. In Part C, the Commission examines some existing models of the judicial discretion in limitations legislation. In Part D, the Commission analyses the merits and drawbacks of introducing such a discretion. In Part E, the Commission sets out its conclusions and recommendation on this issue.

B Evolution of the Approach taken to Discretion

6.03 A discretion to extend or dis-apply limitation periods has been introduced in various other jurisdictions. Some have enacted legislation allowing judges to extend the running of the limitation period up to a particular length of time while others have afforded judges the discretion to dis-apply a limitation period, the latter being a much wider jurisdiction.

6.04 The exercise of judicial discretion to extend or dis-apply has the effect of depriving the defendant of what would otherwise be a complete defence to the action, i.e. that the summons was issued too late.¹ Conversely, if the court refuses to exercise its discretion, the plaintiff will be statute-barred and his action against the defendant will not be allowed to proceed. Given these potentially grave consequences, careful consideration must be given to the introduction of judicial discretion as a general feature of limitations law in Ireland.

6.05 Judicial discretion has been considered by various agencies over a number of decades. In particular, the Law Revision Committee of Parliament and the Law Commission of England and Wales have undergone a considerable evolution in their approach to judicial discretion. The development

¹ See *Thompson v Brown* [1981] 1 WLR 744, 750.

of their assessment of the merits and pitfalls of the introduction of judicial discretion, set out hereafter, are both interesting and instructive.

(1) The Wright Committee (1936)

6.06 The Wright Committee in 1936 considered the introduction of judicial discretion to extend the limitation period in appropriate cases.² It acknowledged the “obvious advantages” of giving a discretion of this kind to the courts, namely that such discretion “*would obviate the cases of hardship which are bound to occur under any rigid system of limitation, however well devised*”, and that it “*would enable shorter general periods to be prescribed, without the danger of increasing those cases of hardship*.”³ It was noted that the “chief merit” in the introduction of judicial discretion would be flexibility.⁴

6.07 The Wright Committee considered, however, that there were “formidable objections” to the introduction of judicial discretion, namely that the exercise thereof would present difficulties for the courts and that it was not easy to foresee how it would operate.⁵ Moreover, the flexibility that would be introduced would tend to disappear if principles were to emerge as to how the discretion should be exercised. Conversely, if no such principles came to be adopted and it remained more or less impossible to predict how the court would exercise its discretion, the benefit of certainty that is conferred by statutes of limitation would be prejudiced.⁶

6.08 The Committee examined section 8 of the *Maritime Conventions Act 1911*, which allows for judicial discretion to extend the two-year limitation period for actions to enforce a maritime lien, and section 14(1) of the *Workmen’s Compensation Act 1925*, which also allowed for extension in the case of mistake, absence from the UK, or “other reasonable cause”. The Committee considered that special considerations applied in each of these cases which justified the provisions in question, but which were not sufficiently applicable in general to outweigh the disadvantage of uncertainty.⁷ It did not, therefore, recommend the introduction of judicial discretion to extend the limitation period.⁸

² Law Revision Committee *Fifth Interim Report: Statutes of Limitation* (Cmd. 5334, 1936) at paragraph 7.

³ *Ibid* at paragraph 7.

⁴ *Ibid* at paragraph 7.

⁵ *Ibid* at paragraph 7.

⁶ *Ibid* at paragraph 7.

⁷ *Ibid* at paragraph 7.

⁸ *Ibid* at paragraph 7.

6.09 The Wright Committee's recommendations were substantially enacted under the English *Limitation Act 1939* and, accordingly, no statutory discretion was accorded to the Courts.

(2) The Tucker Committee (1949)

6.10 In 1949, the Tucker Committee considered that provision should be made for exceptional personal injuries cases by allowing an applicant to apply for leave to bring an action more than two years, but not later than six years, after the accrual of the cause of action. The judge should have a discretion to grant leave to bring the action "if satisfied that it is reasonable in all the circumstances so to do."⁹ A long-stop period of six years running from accrual would apply, after which the court's discretion would no longer be exercisable.¹⁰

6.11 The Tucker Committee noted that the evidence showed that "the great majority" of claims are notified at an early date after the occurrence of the incident giving rise to the claim, and that actions are in the main commenced reasonably promptly. It indicated that where there is great delay, the probability therefore is that either there is good reason for the delay, or that the claim is not a bona fide one. It concluded, therefore, that whether the reason is one or the other may be safely left to the decision of the court.¹¹

6.12 These recommendations were not implemented. Instead, the *Law Reform (Limitation of Actions) Act 1954* implemented the recommendation of the Monckton Committee that the limitation period should be fixed at three years from accrual.¹²

(3) The Edmund Davies Committee (1962)

6.13 The Edmund Davies Committee's 1962 Report addressed the problem of latent personal injuries.¹³ It recommended the introduction of a three-year limitation period in cases of latent personal injury, running from the

⁹ Law Revision Committee *Report on the Committee on the Limitation of Actions* (Cmd.7740, 1949), at paragraph 22.

¹⁰ See Law Reform Committee of Parliament *Twentieth Report: Interim Report on Limitation of Actions in Personal Injuries Claims* (Cmnd. 5630, 1975), at paragraph 36.

¹¹ Law Revision Committee *Report on the Committee on the Limitation of Actions* (Cmd.7740, 1949), at paragraph 22.

¹² Monckton Committee *Report on Alternative Remedies* (Cmd. 6860, 1946), at paragraph 107.

¹³ Committee on Limitation of Actions *Report on Limitation of Actions in Cases of Personal Injury* (Cmnd. 1829, 1962).

date of knowledge and supplemented by a twelve month extension.¹⁴ The Committee rejected the idea of introducing judicial discretion to extend the new, comparatively shorter limitation period. It appreciated the advantage of the apparent simplicity of this approach but considered that it would lead to uncertainty and divergences of approach on the part of the judges.¹⁵

6.14 The Committee's recommendations were substantially implemented by the *Limitation Act 1963* and, accordingly, the courts were not given discretion to extend the new limitation period.

(4) The Orr Committee Report of 1975 - personal injuries

6.15 In 1975, the Orr Committee considered the introduction of a comparatively short period of limitation (i.e. two or three years) for personal injuries actions, supplemented by a wide judicial discretion to extend the limitation period in meritorious cases.¹⁶ The Committee noted that the Wright and the Edmund Davies Committees had rejected such an approach on the basis of the potential uncertainty that it would involve, and it agreed that "[i]t is self-evident that any provision which gives the court a discretion must *pro tanto* erode the certainty of the law."¹⁷ It considered, however, that in the field of personal injuries, "a measure of discretion is inevitable".¹⁸

6.16 The Orr Committee decided against making the plaintiff entirely dependent on the court's discretion on the following basis:

"[T]o make extension of the three-year period purely discretionary would not only entail the disadvantages referred to by the Edmund Davies Committee; it would also curtail the advantages conferred on an injured person by the 1963 Act, because at present, provided he can show that he has started proceedings within three years of his date of knowledge, he is entitled as of right to defeat a defence of limitation. This we think is a valuable right and, moreover, its existence means that in most cases both plaintiff and defendant know where they stand

¹⁴ *Ibid* at 18-19.

¹⁵ Committee on Limitation of Actions *Report on Limitation of Actions in Cases of Personal Injury* (Cmnd. 1829, 1962) at paragraph 31.

¹⁶ Law Reform Committee of Parliament *Twentieth Report: Interim Report on Limitation of Actions in Personal Injuries Claims* (Cmnd. 5630, 1975) at paragraph 34-35.

¹⁷ *Ibid* at paragraph 35.

¹⁸ *Ibid* at paragraph 35.

on the issue of limitation and are therefore more likely to reach a reasonable settlement without ever bringing the action to trial.”¹⁹

6.17 The Orr Committee therefore recommended a combination of the date of knowledge test with a “*residual discretionary power vested in the court to extend that period in cases where the strict application of the “date of knowledge” principle would cause injustice.*”²⁰ Like its predecessors, the Committee recommended the discontinuation of the need to obtain leave.²¹

6.18 The recommendations of the Orr Committee were substantially implemented by the *Limitation Act 1975*, which introduced section 2D into the *Limitation Act 1939*. That section established a discretionary limitation period, running following the expiry of the primary limitation period. This discretion is discussed further at page 269 below.

(5) The Orr Committee Report of 1977 - Latent Damage

6.19 In 1977, when assessing the problem of property damage actions (other than personal injuries) and actions for economic loss, the Orr Committee considered the introduction of discretion to override an otherwise valid limitation defence.²² It considered that the “obvious” advantage of this discretion was that “*it enables hard cases to be dealt with on their particular facts and without putting the court into the difficult position of having either to “bend” the statutory provision or to fail to do justice.*”²³ It was observed, however, that discretion involves “*a greater measure of uncertainty than does the date of knowledge principle, even if “guidelines” are specified in the statute.*”²⁴ It was also pointed out that in latent damages cases, it would be more difficult to formulate

¹⁹ *Ibid* at paragraph 35.

²⁰ Law Reform Committee of Parliament *Twentieth Report: Interim Report on Limitation of Actions in Personal Injuries Claims* (Cmnd. 5630, 1975) at paragraph 38.

²¹ *Ibid* at paragraph 33.

²² Law Reform Committee of Parliament *Twenty-First Report: Final Report on Limitation of Actions* (Cmnd. 6923, 1977) at paragraph 2.5 *et seq.* The Committee noted the precedent to be found in section 2D into the *Limitation Act 1939*, and in section 8 of the *Maritime Conventions Act 1911*. *Ibid* at paragraph 2.30. The Committee also considered a concealed fraud approach and a date of knowledge test.

²³ *Ibid* at paragraph 2.33.

²⁴ *Ibid* at paragraph 2.33.

guidelines to the exercise of discretion “across the board” than in personal injuries claims alone.²⁵

6.20 The Committee was unable to reach a unanimous decision as to the appropriate starting point for latent damage actions. The *majority* favoured the view that the best course was to preserve the accrual test. Certainty was the prime consideration. It was noted that hard cases would be few and that justice to defendants who have not acted in any unconscionable fashion demands that the defendants be protected once the limitation period has run.²⁶ The *minority* agreed that the accrual test should be retained but it felt that a residual discretion to extend the limitation period should be introduced to mitigate the harshness of the accrual rule for parties who could not have learned about their cause of action during the standard limitation period. The proposed discretion would be limited to latent damage cases (e.g. professional advice and building and engineering contracts), and the exercise of the discretion would be conditional upon consideration of the nature of the claim and the circumstances pertaining thereto.²⁷

6.21 The *Latent Damage Act 1986* inserted sections 14A and 14B into the *Limitation Act 1980*. These sections apply to all actions for damage for negligence other than personal injuries actions.²⁸ Section 14A provides that the time for bringing the action expires at the later of six years from accrual, or three years from the “starting date”.²⁹ Section 14B sets a long-stop of 15 years.³⁰ The courts do not have discretion to extend any of these limitation periods.

(6) Law Commission for England and Wales (1998, 2001)

6.22 In its most recent analysis of the limitation of actions, the Law Commission for England and Wales considered the introduction of a general

²⁵ *Ibid* at paragraph 2.33.

²⁶ Law Reform Committee of Parliament *Twenty-First Report: Final Report on Limitation of Actions* (Cmnd. 6923, 1977) at paragraph 2.35.

²⁷ *Ibid* at paragraph 2.36.

²⁸ The application of this section is not entirely clear, but in general it can be said that it has no application to actions in contract, but applies to cases involving defective buildings. It is not confined to actions in respect of what is commonly described as ‘latent damage’. McGee *Limitation Periods* (5th ed 2006), at paragraphs 6.003- 6.008; 6.022.

²⁹ Section 14A, *Latent Damage Act 1986*.

³⁰ *Ibid* at section 14B.

judicial discretion to dis-apply limitation periods which would apply to a wide range of causes of action.³¹

6.23 In its 1998 Consultation Paper, the Law Commission noted that the introduction of statutory judicial discretion to dis-apply the limitation period had engendered a huge number of cases. Further, it meant that in the absence of a long-stop or ultimate limitation period, defendants must retain records for many years for fear that they may be exposed to claims many years after the occurrence of an act or omission that gives rise to a cause of action.³² It was noted that “to rely on judicial discretion needlessly risks inconsistency and uncertainty on a fundamental policy issues which can be, and should be, decided once and for all.”³³ On that basis and for the following reasons, it provisionally recommended the removal of the discretion:

“We believe the disadvantages of a judicial discretion [...] outweigh the advantages. Experience with the discretion under section 33 of the Limitation Act 1980 demonstrates the difficulty of restricting the discretion. Moreover, the exercise of the discretion by the court of first instance means a huge drain on court resources (as well as the costs for defendants in resisting such applications). [...] It is very difficult for applications to be ruled out as raising no arguable case.”³⁴

6.24 In its Report, published in 2001, the Law Commission noted that the question of whether or not there should be a general discretion to dis-apply the limitation period was “one of the most controversial areas of our proposals.”³⁵ It observed that of the consultees who responded to that issue, there was an equal divide between those in favour and those opposed. Of those in favour, it was noted that the majority were particularly concerned with the possible consequences for personal injuries claims,³⁶ but only 15% of consultees were in favour of the introduction of a general discretion.³⁷

³¹ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998); Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001)

³² Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 3.

³³ *Ibid* at 251.

³⁴ *Ibid* at 322.

³⁵ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.156.

³⁶ *Ibid* at paragraph 3.156.

³⁷ *Ibid* at paragraph 3.159.

6.25 The Law Commission reiterated that the chief merit of judicial discretion is that a judge can take account of the individual circumstances of a case and is not confined to the application of a strict rule. The judge can therefore prevent injustice to an individual claimant who has failed to commence proceedings within the standard limitation period for reasons that seem excusable to the judge.³⁸

6.26 The Law Commission asserted however that the benefits of such flexibility must be weighed against the risk of injustice to the defendant and the consequent uncertainty that would be involved for all who might be involved in a case or upon whom the final decision might impact. It was noted that the English Court of Appeal has refused to set down guidelines for the exercise of judicial discretion³⁹ and that it is therefore difficult, at times, to give accurate legal advice as to how a case might proceed.

6.27 Ultimately, the Law Commission concluded that the level of uncertainty involved for defendants outweighed the benefits of judicial discretion.⁴⁰

“Justice for the individual claimant may come at the cost of increased uncertainty for claimants in general, their advisers, and other parties who need to be able to rely on the certainty which could be provided by a limitation period.”

6.28 The Law Commission hesitantly recommended the retention of the discretion to dis-apply the limitation period for personal injuries actions. It noted that the consequences of being unable to commence proceedings in respect of personal injuries are more serious than those in respect of economic loss or property damage.⁴¹ It was also influenced by the need for a discretion in sexual abuse claims, which it had recommended would be subject to the ordinary personal injuries limitation period.⁴²

6.29 The Law Commission recommended only minor changes to the guidelines contained in section 33 of the *Limitation Act 1980*, except to recommend that the court should have regard to “*any hardship*” which would be

³⁸ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.157.

³⁹ See e.g. *Hartley v Birmingham City District Council* [1992] 2 All ER 213.

⁴⁰ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.159.

⁴¹ *Ibid* at paragraph 3.160.

⁴² *Ibid* at paragraph 3.161.

caused to the plaintiff if the limitation period applied.⁴³ As noted at page 167 above, preparations are ongoing for the introduction of a Draft *Civil Law Reform Bill* which will, among other things, seek to implement the Law Commissions' recommendations as to the reform of the law of limitation.

C Existing Models

(1) Ireland

6.30 As was noted above in Chapter 2, section 38 of the *Defamation Act 2009* amends section 11 of the *Statute of Limitations 1957* so as to introduce a new, one-year basic limitation period in Ireland for the tort of defamation. The one-year period is to be extendable at the discretion of the courts for up to one further year. Thus, the maximum time available to a plaintiff within which to commence proceedings will be two years, running from the date of publication. This is only the second instance of judicial extension of the basic limitation period in Ireland (the first being section 46(3) of the *Civil Liability Act 1961*, discussed in Chapter 2 above).

6.31 In order for a court to exercise its discretion to extend the time available to a plaintiff under the new section 11(3A)(a), the court must be satisfied that the interests of justice require the giving of the direction.⁴⁴ This equates broadly to the question of whether or not it is 'equitable' to allow a claim to proceed under sections 32A and section 33 of the English *Limitation Act 1980*. In addition, the court must be satisfied that the prejudice that the plaintiff would suffer if the extension was refused would significantly outweigh the prejudice that the defendant would suffer if the extension was granted.⁴⁵ This second factor is similar to the 'balance of prejudice' test, exercised under the English *Limitation Act 1980* which is discussed at page 271 below.

6.32 In deciding whether to exercise its discretion, the court is also mandated to have regard to the following:

- The reason for the failure to bring the action within the initial one-year limitation period; and
- The extent to which any evidence relevant to the matter is no longer capable of being adduced, by virtue of the delay.⁴⁶

⁴³ *Ibid* at paragraph 3.169.

⁴⁴ Section 11(3A) (a), *Statute of Limitations 1957*, inserted by section 38(1) (b) of the *Defamation Act 2009*.

⁴⁵ *Ibid* at section 11(3A) (b).

⁴⁶ *Ibid* at section 11(3A).

6.33 This may be compared to section 33 of the English *Limitation Act 1980*, which requires consideration of the circumstances of the case.⁴⁷

6.34 The question of the balance of prejudice matter under the new section 11(3A) of the *Statute of Limitations 1957* (i.e. whether the prejudice that the plaintiff would suffer if the limitation period were not so extended would “significantly outweigh” the prejudice that the defendant would suffer) follows the recommendation of the Mohan Report.

(2) England and Wales

6.35 At present, the courts in England and Wales have discretion to extend or dis-apply the limitation period in personal injuries actions and defamation actions, both of which are discussed below.

6.36 In addition, the courts have discretion in a variety of specialised contexts including claims taken under the *Matrimonial Causes Act 1973*,⁴⁸ the *Carriage of Passengers by Road Act 1974*,⁴⁹ the *Solicitors Act 1974*,⁵⁰ the *Inheritance (Provision for Family and Dependents) Act 1975*,⁵¹ the *Discrimination Acts*,⁵² the *Company Directors Disqualification Act 1986*,⁵³ the *Merchant Shipping Act 1995*,⁵⁴ and the *Employment Rights Act 1996*.⁵⁵

⁴⁷ Section 33(3)(a) requires the court to take into account the length of and reasons for the delay on the part of the plaintiff. Section 33(3)(b) mandates consideration of “the extent to which the cogency of evidence likely to be adduced by either the plaintiff or the defendant is likely to be less as a result of the delay.”

⁴⁸ Section 13, *Matrimonial Causes Act 1973* (c. 18), as amended by the *Matrimonial and Family Proceedings Act 1984* (c. 42).

⁴⁹ Schedule - Article 22, *Carriage of Passengers by Road Act 1974* (c.35).

⁵⁰ Section 70(3), *Solicitors Act 1974* (c.47).

⁵¹ Section 4, *Inheritance (Provision for Family and Dependents) Act 1975* (c. 63).

⁵² Section 76(5), *Sex Discrimination Act 1975* (c. 65); section 68(6), *Race Relations Act 1976* (c.74); Schedule 3- Part I, paragraphs 3(2) and 25(6) and Part II, paragraph 6(3), *Disability Discrimination Act 1996* (c. 50).

⁵³ Section 7(2), *Company Directors Disqualification Act 1986* (c. 46).

⁵⁴ Sections 190(5) and (6), (C. 21). *Merchant Shipping Act 1995* (c. 21). Schedule 12 of the Act repealed the *Maritime Conventions Act 1911* (1 & 2 Geo.5 c.57), which also provided for judicial discretion to extend the limitation period.

⁵⁵ Section 111(2)(b), *Employment Rights Act 1996* (c. 18).

(a) Personal Injuries Actions

6.37 The limitation periods applied to personal injuries cases under the English *Limitation Act 1980* are, at first glance, much more stringent than the six-year general limitation period applicable to tort actions. The rigour of the shorter limitation periods is, however, mitigated by the courts' discretion to dis-apply that short period.

6.38 Section 33 of the *Limitation Act 1980* is a re-enactment of section 2D of the *Limitation Act 1939*.⁵⁶ The courts may, under section 33, dis-apply the three-year limitation period applicable under sections 11, 11A and 12 of that Act, and allow a case to proceed even where it is initiated outside of the three-year limitation period.⁵⁷ This has been described as "one of the most important and most heavily used provisions in the law of limitations."⁵⁸

6.39 As to the courts' jurisdiction to issue a direction that the primary limitation period will be dis-applied, in the UK House of Lords decision in *Thompson v Brown*⁵⁹ Lord Diplock commented:

"A direction under [section 33] must therefore always be highly prejudicial to the defendant, for even if he also has a good defence on the merits he is put to the expenditure of time and energy and money in establishing it, while if, as in the instant case, he has no defence as to liability he has everything to lose if a direction is given under the section. On the other hand if, as in the instant case, the time elapsed after the expiration of the primary limitation is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall."

6.40 The courts may exercise their discretion to dis-apply where it appears equitable to allow the action to proceed.⁶⁰ The court should have regard to the degree to which the application of the limitation period would prejudice the plaintiff or any person whom he represents, and the degree to which the dis-application of the primary limitation period would prejudice the defendant or any

⁵⁶ So described by Lord Diplock in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, 616 (HL).

⁵⁷ Section 33, *Limitation Act 1980* (c.58).

⁵⁸ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 52.

⁵⁹ *Thompson v Brown* [1981] 1 WLR 744, 750.

⁶⁰ Section 33(1), *Limitation Act 1980* (c.58).

person whom he represents.⁶¹ Thus, the court has to balance the likely prejudice occasioned to the respective parties.

6.41 The discretion of the court is fettered only to the extent that a non-exhaustive list of circumstances to which the court should have regard is provided.⁶² Thus, addition to assessing the balance of prejudice, the courts must have regard to all the circumstances of the case. The following factors must, under the statute, be taken into account:-

- (a) The length of and reasons for the delay on the part of the plaintiff;
- (b) The extent to which the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is less likely to be less cogent than if the action was brought within the three-year limitation period;
- (c) The conduct of the defendant after the cause of action arose, include the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) The duration of any disability of the plaintiff arising *after* the date of accrual;
- (e) The extent to which the plaintiff acted promptly and reasonably once he knew that the defendant's act or omission might be capable of giving rise to an action for damages;
- (f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.⁶³

6.42 The list is not exhaustive, and has been labelled "a curious hotchpotch".⁶⁴ Factors (a) and (b) relate to the degree of prejudice that would be suffered by the plaintiff and the defendant, if there matter was allowed to proceed. The delay referred to here is delay after the expiration of the limitation period.⁶⁵ Factors (c) to (f) are those which affect the equity of the

⁶¹ Section 33(1), *Limitation Act 1980* (c.58).

⁶² *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, 1468.

⁶³ Section 33(3), *Limitation Act 1980* (c.58).

⁶⁴ *Thompson v Brown* [1981] 1 WLR 744, 751.

⁶⁵ *Thompson v Brown* [1981] 1 WLR 744, 751.

situation. Factor (c) relates to the defendant's conduct, and (e) and (f) relate to the plaintiff's conduct.

6.43 The interpretation of these factors has generated a considerable amount of jurisprudence. The matter is not determined simply by assessing comparative scales of hardship; rather, the overall question is one of equity.

6.44 The exercise of the courts' discretion has been considered "an exceptional indulgence to a claimant".⁶⁶ It is little comfort to a potential defendant that the burden of showing that it would be equitable to dis-apply the limitation period lies with the claimant, or that this is considered "a heavy burden".⁶⁷ Criticism has also been levied at the fact that the courts' discretion to dis-apply operates as an adjunct to extension provisions based on discoverability.⁶⁸ This is because the general rule has already catered for delay in starting proceedings that is due to excusable ignorance of material facts by the plaintiff.⁶⁹

(b) Defamation

6.45 The UK *Defamation Act 1986*⁷⁰ amended the *Limitation Act 1980* with respect to the limitation of defamation actions, such that a one-year limitation period now applies to for actions for libel and slander.⁷¹ This limitation period is, therefore, even more stringent than the three-year limitation period set for personal injuries. The rigour of the one-year limitation period is, however, mitigated by the courts' discretion to dis-apply the limitation period.⁷²

⁶⁶ *KR v Bryn Alyn Community (Holdings) Ltd* [2003] 1 QB 1441, 1470.

⁶⁷ *Ibid* at 1470.

⁶⁸ See e.g. Davies "Limitations of the Law of Limitation" (1982) 99 LQR 249; Morgan "Limitation and Discretion: Procedural Reform and Substantive Effect" (1982) 1 CJQ 109.

⁶⁹ *Thompson v Brown* [1981] 1 WLR 744, 752.

⁷⁰ Section 5, *Defamation Act 1996* (c.31). Section 5 of the 1996 Act also amended sections 28(4A) and 32A of the *Limitation Act 1980*.

⁷¹ Section 4A, *Limitation Act 1980* (c.58). A previous amendment had reduced the limitation period to three-years; see section 57, *Administration of Justice Act 1985* (c. 61).

⁷² Section 32A, *Limitation Act 1980* (c.58).

6.46 The court must have regard to the same factors addressed in relation to the extension of personal injuries actions.⁷³ All the circumstances of the case must be taken into account, including the following:

- (a) The length of and reasons for the delay on the part of the plaintiff;⁷⁴
- (b) Where the reason (or one of the reasons) for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the one-year limitation period-
 - i. The date on which any such facts became known to him; and
 - ii. The extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action;⁷⁵ and
- (c) The extent to which, having regard to the delay, relevant evidence is likely -
 - i. To be unavailable, or
 - ii. To be less cogent than if the action had been brought within the one-year limitation.⁷⁶

6.47 This list of factors that must be considered is, for the most part, a replication of the factors to which consideration must be given when the courts are exercising their discretion to dis-apply the limitation period in respect of personal injuries actions. The circumstances omitted in the list applicable to the dis-application of the defamation limitation periods were, it is assumed, thought irrelevant or insufficiently important to defamation cases as opposed to personal injuries actions.⁷⁷ Although this discretion is “structured” by the statutory guidelines, it is very wide and has been described as “unfettered”.⁷⁸

(c) Practice and Procedure

6.48 The English Court of Appeal has stated that limitation issues should be determined, where possible, by a preliminary hearing by reference to the pleadings and written witness statements and the extent and content of

⁷³ Section 32A(1), *Limitation Act 1980* (c.58).

⁷⁴ This provision equates to section 33(1)(a), *Limitation Act 1980* (c.58).

⁷⁵ This provision is similar to section 33(3)(c), *Limitation Act 1980* (c.58).

⁷⁶ This provision equates to section 33(3)(b), *Limitation Act 1980* (c.58).

⁷⁷ Law Commission for England and Wales *Limitation of Actions* (Consultation Paper No. 151, 1998) at 65.

⁷⁸ *Thompson v Brown* [1981] 1 WLR 744, 752; *Donovan v Gwentys Ltd* [1990] 1 WLR 472, 477.

discovery.⁷⁹ If this is not possible, the court should be careful not to determine the substantive issues (i.e. liability, causation and quantum) before determining the issue of limitation. In particular, the court should assess the effect of delay on the cogency of the evidence before determining the substantive issues.⁸⁰

(3) Scotland

6.49 Since 1980 the Scottish courts have had a discretionary power to override time limits in personal injury cases.⁸¹ In order for the courts have jurisdiction to do so, it must seem equitable for the court to extend the limitation period.⁸² The courts' discretion is otherwise unfettered and there is no list of statutory guidelines to which the court must have regard.⁸³ Where the court does exercise its discretion, the action may not be tried by jury.⁸⁴

6.50 In a Consultative Memorandum published before this discretion was introduced, the Scottish Law Commission was not in favour of the introduction of judicial discretion, considering that such discretion would introduce uncertainty and divergence of approach on the part of judges.⁸⁵ In a subsequent Report, published after the introduction of the discretion, the Commission acknowledged that consultees were not in favour of judicial discretion but considered it inappropriate to recommend the repeal of the relevant section before experience had been gained of the working of the section.⁸⁶ The Commission recommended against the introduction of statutory

⁷⁹ *KR v Bryn Alyn Community (Holdings) Ltd* [2003] 1 QB 1441, 1471.

⁸⁰ *Ibid* at 1471.

⁸¹ Section 19A, *Prescription and Limitation (Scotland) Act 1973* (c. 52)- inserted by section 23, *Law Reform (Miscellaneous Provisions) (Scotland) Act 1980* (c. 55); amended by section 10(2), *Protection from Harassment Act 1997* (c. 40) and by Schedule 1 - article 8, *Prescription and Limitation (Scotland) Act 1984* (c. 45).

⁸² Section 19A(1), *Prescription and Limitation (Scotland) Act 1973* (c. 52), as amended.

⁸³ A non-exhaustive list was provided in *Carson v Howard Doris Ltd* [1981] SC 278, 282 (Lord Ross) and in *B v Murray (No. 2)* [2005] CSOH 70 (Lord Drummond Young) at paragraph 29.

⁸⁴ Section 19A(4), *Prescription and Limitation (Scotland) Act 1973* (c. 52), inserted by Schedule 1 - article 8, *Prescription and Limitation (Scotland) Act 1984* (c. 45).

⁸⁵ Scottish Law Commission *Consultative Memorandum on Time-Limits in Actions for Personal Injuries* (No. 45, 1980).

⁸⁶ Scottish Law Commission *Report on Prescription and the Limitation of Actions* (No. 74, 1983).

guidelines, partly on the basis of experience in England and Wales, partly because they were considered unnecessary.

6.51 As is the case in England and Wales, the courts' discretion to override the limitation period in personal injuries actions has since been subject to considerable judicial interpretation in Scotland.⁸⁷ The crucial consideration is the equity of the situation.⁸⁸ In its *Report on Personal Injury Actions* published in December 2007, the Scottish Law Commission noted that although the outcome of each case turns on its facts, "*judges have tended to develop similar approaches*" to the factors to which they have regard in determining whether or not to exercise the discretion.⁸⁹ For instance, judges commonly undertake the balancing of prejudices likely to be suffered by the respective parties, and have regard to the conduct of the parties.⁹⁰ Thus, the concerns that were expressed when the discretion was introduced do not appear to have materialised.⁹¹

6.52 During the consultation phase of its most recent review, the Scottish Law Commission found that "*nearly all*" of its consultees were in favour of the retention of this discretionary power.⁹² The Commission noted that the need for judicial discretion is clearly greater where there is no discoverability provision and the limitation period runs from the date of accrual of the cause of action. It observed, however, that the argument has been made that the converse is also true - a discretionary power is, or ought to be, unnecessary if the knowledge or discoverability test is sufficiently framed.⁹³ That notwithstanding, the Scottish Law Commission was still inclined to retain judicial discretion in addition to formulating a subjective discoverability test.⁹⁴

6.53 The Scottish Law Commission noted that many personal injury actions are commenced close to the expiry of the limitation period, owing to a desire to settle. Additionally, there is scope for things to go wrong and for

⁸⁷ For a synopsis, see *B v Murray (No. 2)* [2005] CSOH 70 (Lord Drummond Young, at paragraph 29); affirmed at [2007] CSIH 39.

⁸⁸ See *Forsyth v AF Stoddard & Co.* [1985] SLT 51, 55 (Clark Wheatley LJ); *Elliot v J & C Finney* [1989] SLT 605, 608F (Clerk Ross LJ).

⁸⁹ Scottish Law Commission *Report on Personal Injuries Actions: Limitation and Prescribed Claims* (Scot Law Com No 207, 2007) at 37.

⁹⁰ *Ibid* at 37-38.

⁹¹ *Ibid* at 41.

⁹² *Ibid* at 41.

⁹³ *Ibid* at 39-40.

⁹⁴ *Ibid* at 39-40.

mistakes to occur in the process of commencing proceedings. The Commission considered that it was desirable to retain judicial discretion to deal with those “technical or accidental cases of missing the time limit”.⁹⁵ Furthermore, judicial discretion could be exercised to mitigate harshness in child sexual abuse cases.⁹⁶ Thus, the Scottish Law Commission’s considerations reflected the concerns expressed by the Law Commission for England and Wales in its most recent review with respect to the abolition of discretion.

6.54 The Scottish Law Commission did not consider that the exercise of judicial discretion should be subject to a time limit.⁹⁷ It recommended the introduction of a non-exhaustive list of statutory guidelines which the court may take into account in deciding whether to exercise its discretion.⁹⁸ It recommended no change to the current situation as to the onus of proof, which - as in England and Wales - lies with the plaintiff to persuade the court that it is equitable to allow the otherwise time-barred action to proceed.⁹⁹

(4) Australia

6.55 Judicial discretion provisions that were introduced in the various Australian jurisdictions in recent decades have recently been re-formulated as a result of the *Defamation Acts 2005 and 2006*.¹⁰⁰

⁹⁵ Scottish Law Commission *Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 132, 2006) at paragraphs 3.21-3.22.

⁹⁶ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at 41.

⁹⁷ *Ibid* at 42.

⁹⁸ *Ibid* at 43-47.

⁹⁹ *Ibid* at 48.

¹⁰⁰ See section 21B(1), *Limitation Act 1985 (ACT)*; section 14B, *Limitation Act 1969 (NSW)*; section 12(1A), *Limitation Act 1981 (NT)*; section 10AA, *Limitation of Actions Act 1974 (Qld)*; section 37(1), *Limitation Act 1936 (SA)*; section 20A(1), *Defamation Act (Tas)*; section 5(1AAA), *Limitation of Actions Act 1958 (Vic)*; section 15, *Limitation Act 2005 (WA)*.

Jurisdiction	Judicial Discretion to Extend
<i>A.C.T.</i>	Sections 36-40, <i>Limitation Act 1985</i>
<i>New South Wales</i>	Sections 56A-62F , <i>Limitation Act 1969</i>
<i>Northern Territory</i>	Sections 44 and 44A, <i>Limitation Act 1981</i>
<i>Queensland</i>	Section 31 and 32A, <i>Limitation Act 1974</i>
<i>Southern Australia</i>	Section 48, <i>Limitation of Actions Act 1936</i>
<i>Tasmania</i>	Sections 5 and 5A, <i>Limitation Act 1974</i>
<i>Victoria</i>	Parts II and IIA, <i>Limitation of Actions Act 1958</i>
<i>Western Australia</i>	Sections 38-44, <i>Limitation Act 2005</i>

(a) Australian Capital Territory

Sections 36 to 40 of the ACT *Limitation Act 1985 (Australian Capital Territory)*¹⁰¹ provide for the extension of the relevant limitation periods for personal injuries actions, actions by and against the estate of a deceased person, and actions in respect of latent property damage.

(i) ACT: Personal Injuries Actions

6.56 The extension of the limitation period in personal injuries actions is only available if the action accrued on or before 9 September 2003.¹⁰²

6.57 Prior to 2003, the six-year limitation period applicable to personal injuries actions could be extended under section 36(2) of the 1985 Act. The court could hear such persons likely to be affected by an extension as it considered appropriate, and its discretion could be exercised where it decided that it was “just and reasonable” to extend the limitation period. The extension could last for such period as the court determined.¹⁰³ The court was mandated to have regard to all the circumstances of the case and a non-exhaustive list of factors that could be considered by the court was provided.¹⁰⁴ The court could

¹⁰¹ A1985-66; Repub. No. 16 of 12 April 2007. This Act was originally the *Limitation Ordinance 1985* (Cwlth).

¹⁰² Date of commencement of the *Civil Law (Wrongs) Amendment Act 2003 (No. 2)*.

¹⁰³ Section 36(2), *Limitation Act 1985* (A1985-66); Repub. No. 16 of 12 April 2007.

¹⁰⁴ Section 36(3), *Limitation Act 1985* (A1985-66); Repub. No. 16 of 12 April 2007.

have regard to factors such as the plaintiff's ability to sue his or her solicitor for negligence, and the prospects of the claim succeeding if it were allowed to proceed to trial.¹⁰⁵ An extension could be granted even though the primary limitation period had expired at the time of the application.¹⁰⁶

6.58 This was a wide discretion, not limited to exceptional cases. It has now been replaced by a stricter discoverability rule. The general extension provision now applies only to actions under section 16 (compensation for relatives), 16A (workers compensation), and 38 (actions by the estate of a deceased person). As a result of amendments made in 2003,¹⁰⁷ a three-year limitation period now applies to personal injuries actions.¹⁰⁸ No extension is available in respect of personal injuries actions accruing after September 9 2003,¹⁰⁹ children's claims relating to health services,¹¹⁰ or wrongful death claims.¹¹¹

(ii) ACT: Survival of Actions

6.59 Sections 37 and 38 of the ACT *Limitation Act 1985* provide for the extension of the limitation period applicable to actions in respect of the estate of a deceased person. Section 38 regulates the situation where the executor or administrator of a deceased person's estate institutes proceedings in respect of personal injuries that accrued to the deceased person before his or her death. The court may extend the limitation period for such actions where it considers it just and reasonable to do so.¹¹² An extension may be granted even if the limitation period for the action has expired.¹¹³ The extension may last for such period as the court considers appropriate but may not exceed six years from the

¹⁰⁵ Handford *Limitation of Actions: The Laws of Australia* (2nd ed 2007), at 109.

¹⁰⁶ Section 36(4), *Limitation Act 1985* (A1985-66); Repub. No. 16 of April 12 2007.

¹⁰⁷ See *Civil Law (Wrongs) Amendment Act 2003 (No. 2)* (A2003-35), section 58; *Limitation Amendment Act 2005* (A2005-64), section 4.

¹⁰⁸ Section 16B, *Limitation Act 1985* (A1985-66); Repub. No. 16 of April 12 2007. This did not apply to compensation for relatives (section 16), claims for workers compensation (sections 16A) or actions for personal injuries brought by a child in relation to the provision of a health service (section 30B).

¹⁰⁹ *Ibid* at section 36(5)(a).

¹¹⁰ *Ibid* at section 36(6).

¹¹¹ *Ibid* at section 36(5)(b).

¹¹² *Ibid* at section 38(1).

¹¹³ *Ibid* at section 38 (1).

date of death.¹¹⁴ As with regular personal injuries actions, the court is mandated to have regard to all the circumstances of the case and a list of sample circumstances that may be considered is provided.¹¹⁵

6.60 Section 39 provides for the extension of the limitation period for actions for compensation for the relatives of a deceased person.¹¹⁶

(iii) ACT: Latent Property Damage

6.61 Section 40 of the ACT *Limitation Act 1985* provides for the extension of the limitation period applicable to actions in respect of latent damage to property, or economic loss in relation to such damage to property.¹¹⁷ The limitation period may be extended for such period as the court considers appropriate, but the Act provides a long-stop period of 15 years from the date of the occurrence of the act or omission upon which the cause of action is based.¹¹⁸ The extension may be granted even if the limitation period for the action has expired.¹¹⁹ The court must consider it “just and reasonable” to extend the limitation period.¹²⁰ As with the above categories of action, the court is mandated to consider all the circumstances of the case, including a non-exhaustive list of factors specified in the Act.¹²¹

(b) New South Wales

6.62 Part 3 of the New South Wales *Limitation Act 1969 (New South Wales)*¹²² deals with the postponement of the limitation periods set down in Part 2 of the Act.

(i) NSW: Personal Injuries Actions

6.63 Divisions 3 and 4 of Part 3 deal with the extension of the limitation period in personal injuries actions. Various different approaches have been

¹¹⁴ Section 38 (1), *Limitation Act 1985* (A1985-66); Repub. No. 16 of 12 April 2007.

¹¹⁵ *Ibid* at section 38(2).

¹¹⁶ *Ibid* at section 39.

¹¹⁷ *Ibid* at section 40.

¹¹⁸ *Ibid* at section 40(1).

¹¹⁹ *Ibid* at section 40(1).

¹²⁰ *Ibid* at section 40(1).

¹²¹ *Ibid* at section 40(2).

¹²² No. 31 of 1969, version of 15 February 2008. This Act resulted from the New South Wales Law Reform Commission's *First Report on the Limitation of Actions* (LRC 3, 1967).

taken to the extension of the limitation period for personal injuries in New South Wales. Prior to 1990, a discoverability test applied to personal injuries actions.¹²³ In 1990, following a Report of the NSW Law Reform Committee,¹²⁴ a new limitation regime was introduced for personal injuries actions.¹²⁵ A three-year limitation period was introduced, running from the date of accrual¹²⁶ and subject to a (maximum) five-year extension by judicial discretion.¹²⁷ The court could order the extension of this limitation period where if decided that it was “just and reasonable” to do so, having heard such of the persons likely to be affected as it saw fit.¹²⁸ As in the ACT legislation, the court was mandated to have regard to “all the circumstances of the case” and, without prejudice to this general obligation, it was to have regard to a list of eight matters that could be relevant to the circumstances of the case.¹²⁹ Crucially, the primary focus was on a fair trial.¹³⁰ A separate discoverability test applied.¹³¹

6.64 A further regime was introduced for personal injuries actions in 2002.¹³² A three-year limitation period applies, running from discoverability, and subject to a 12-year long-stop.¹³³ The primary limitation period cannot be extended but an extension of the long-stop is available where the court decides that it is “just and reasonable” to do so, having heard such persons who are likely to be affected by the application as the court sees fit.¹³⁴ The long-stop can be extended by such period as the court determines, but may not exceed three

¹²³ Section 60A-E, *Limitation Act 1969* (No. 31 of 1969).

¹²⁴ New South Wales Law Reform Commission *Report on the Limitation of Actions for Personal Injuries Claims* (LRC 50, 1986).

¹²⁵ Section 2, *Limitation (Amendment) Act 1990* (No. 36 of 1990). This regime was commenced on September 1 1990.

¹²⁶ Sections 18A (1)(b), *Limitation Act 1969* (No. 31 of 1969).

¹²⁷ *Ibid* at section 60A-E.

¹²⁸ *Ibid* at section 60(C).

¹²⁹ *Ibid* at section 60(E).

¹³⁰ Hanford *Limitation of Actions: The Laws of Australia* (2nd ed 2007) at 112.

¹³¹ Section 60G (2), *Limitation Act 1969* (No. 31 of 1969).

¹³² *Ibid* at sections 62A-62F. Schedule 4.6, *Civil Liability Amendment (Personal Responsibility) Act 2002* (No. 92 of 2002). This regime was commenced on December 6 2002.

¹³³ Section 50C (1), *Limitation Act 1969* (No. 31 of 1969).

¹³⁴ Section 62A, *Limitation Act 1969* (No. 31 of 1969).

years after the date of discoverability.¹³⁵ As before, the court must have regard to “all the circumstances of the case and, without prejudice to this general obligation, it must have regard to a list of eight factors that could be relevant to the circumstances of the case.”¹³⁶

(ii) Defamation Actions

6.65 As a result of recent amendments,¹³⁷ a one-year limitation period applies to defamation actions, running from the date of publication.¹³⁸ This limitation period may be extended for a period of up to three years from the same date.¹³⁹ Thus, the maximum extension is two years from the date of expiry of the primary limitation period. The extension can only be granted where the court is satisfied that it was reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of publication.¹⁴⁰ An extension may be granted even though the primary limitation period has expired at the time of the application.¹⁴¹

(c) Northern Territory

6.66 Section 44 of the Northern Territory *Limitation Act 1981 (Northern Territory)*,¹⁴² as amended,¹⁴³ makes provision for the judicial extension of the limitation periods set by the Act. The court may extend the limitation period “to such an extent, and upon such terms, if any, as it sees fit.”¹⁴⁴ The provisions of this Act are broadly similar to the provisions in force in South Australia.

¹³⁵ For the rules applicable to discoverability, see section 50D, *Limitation Act 1969* (No. 31 of 1969).

¹³⁶ Section 62B, *Limitation Act 1969* (No. 31 of 1969).

¹³⁷ See *Defamation Amendment Act 2002* (No. 136 of 2002); *Defamation Act 2005* (No. 77 of 2005).

¹³⁸ Section 14B, *Limitation Act 1969* (No. 31 of 1969). This was inserted by the *Defamation Amendment Act 2002* (No. 136 of 2002). See also *Defamation Act 2005* (No. 77 of 2005).

¹³⁹ *Ibid* at Section 56A(2).

¹⁴⁰ *Ibid* at Section 56A(2).

¹⁴¹ *Ibid* at section 56D.

¹⁴² No. 87 of 1981. See Reprint No. 26, as in force at November 7 2007. This Act was originally modelled on the New South Wales *Limitation Act 1969*.

¹⁴³ Section 44(1), *Limitation Act 1981* (No. 87 of 1981).

¹⁴⁴ See *Limitation Act 1981* (No. 87 of 1981), Endnotes, *List of Legislation*.

(i) Civil Actions

6.67 Before extending the time available for the instituting of proceedings in civil claims under the Northern Territory *Limitation Act 1981*, the court must be satisfied that in all the circumstances of the case, it is just to grant the extension of time.¹⁴⁵ It must also be satisfied of one of the following:

- (i) That facts material to the plaintiffs case were not ascertained by him until some time after 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
- (ii) That the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances.¹⁴⁶

6.68 Part (a) above is essentially a discoverability test. Part (b) relates to the conduct of the defendant or his agents.

6.69 The court's discretion does not apply to criminal proceedings, or defamation actions.¹⁴⁷ It does extend to personal injuries actions and fatal injuries actions, notwithstanding that the limitation period for the action had expired before the commencement of the *Limitation Act 1981*, or before an application for extension was made.¹⁴⁸

(ii) Defamation

6.70 Under the 1981 Act,¹⁴⁹ defamation actions are subject to a one-year limitation period, running from the date of publication of the defamatory matter. Special rules apply to the extension of this limitation period.¹⁵⁰ The limitation period may be extended to a period of "up to three years" from the date of

¹⁴⁵ *Ibid* at section 44(3)(b).

¹⁴⁶ *Ibid* at section 44(3)(b).

¹⁴⁷ *Ibid* at sections 44(3)(a) and (aa).

¹⁴⁸ *Ibid* at section 44(7).

¹⁴⁹ *Ibid* at section 12(2)(b), inserted by section 49, *Defamation Act 2006* (No. 8 of 2006).

¹⁵⁰ Sections 44A, 44B and 44C, *Limitation Act 1981* (No. 87 of 1981), inserted by section 51, *Defamation Act 2006* (No. 8 of 2006).

publication.¹⁵¹ Thus, in essence, the basic limitation period may be extended by up to two years. A court may not grant the extension unless satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within one year of the publication.¹⁵² An application for extension may be made even where the standard, one-year limitation period has expired.¹⁵³ Where an extension is granted, the limitation period for actions to recover contributions associated with the defamation action is also extended¹⁵⁴

(d) Queensland

6.71 As in the Northern Territory, under the Queensland *Limitation of Actions Act 1974 (Queensland)*, as amended, a one-year limitation period applies to defamation actions, running from the date of publication.¹⁵⁵ A person claiming to have a cause of action for defamation may apply to the court for an order extending this limitation period.¹⁵⁶ An extension may be granted where the court is satisfied that “it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of publication”.¹⁵⁷ The extension may last for a period of up to three years, running from the date of publication.¹⁵⁸ Thus, in essence, the basic limitation period may be extended by up to two years. An extension may be provided even if the application is made after the expiry of the one-year limitation period.¹⁵⁹ Where an extension is given, the expiry of the basic limitation period has no effect for the purposes of limitation.¹⁶⁰

¹⁵¹ Section 44A(2), *Limitation Act 1981* (No. 87 of 1981).

¹⁵² *Ibid* at sections 44A(2) and (3).

¹⁵³ *Ibid* at section 44C

¹⁵⁴ *Ibid* at section 44B.

¹⁵⁵ Section 10AA, *Limitation of Actions Act 1974 (Qld)* (Reprint 2A), as in force on September 28 2007.

¹⁵⁶ *Ibid* at section 32A(1).

¹⁵⁷ *Ibid* at section 32A(2).

¹⁵⁸ *Ibid* at section 32A(2).

¹⁵⁹ *Ibid* at section 32A(4).

¹⁶⁰ Section 33, *Limitation of Actions Act 1974 (Qld)* (Reprint 2A), as in force on September 28 2007.

6.72 An application for an extension may be made *ex parte*, but the court may require that notice of the application be given to any person to whom the judge thinks it proper that notice should be given.¹⁶¹

(e) South Australia

6.73 Under the South Australia *Limitation of Actions Act 1936 (South Australia)*,¹⁶² personal injuries actions are subject to a limitation period of three years.¹⁶³ Since the 1936 Act was amended in 1972, the courts have the power to extend this limitation period, not only in personal injuries cases, but in relation to any cause of action, according to the justice of the case.¹⁶⁴ This wide discretion may be compared to the discretion available in the Northern Territory.¹⁶⁵

6.74 Under the South Australia legislation, the courts may extend time-limits or limitation periods to such an extent and upon such conditions, if any, as the justice of the case may require. As in the Northern Territory, the Southern Australian courts must first be satisfied that in all the circumstances of the case, it is just to grant the extension of time.¹⁶⁶ Unlike the Northern Territory, however, the circumstances to which the courts in South Australia should have regard have been codified.¹⁶⁷ These include but are not limited to: the period of the extension sought, prejudice, the desirability of bringing litigation to an end within a reasonable time, the nature and extent of the plaintiff's loss, and the conduct of the parties.

6.75 As in the Northern Territory, the Southern Australian court must also be satisfied of one of the following:

¹⁶¹ *Ibid* at section 34(1).

¹⁶² No. 2268 of 1936. Version of January 18 2007.

¹⁶³ *Limitation of Actions Act 1936* (No. 2268 of 1936), as amended by the *Limitation of Actions and Wrongs Acts Amendment Act 1956* (SA) (No. 17 of 1956).

¹⁶⁴ *Ibid* at section 48, inserted by the *Statutes Amendment (Miscellaneous Provisions) Act 1972* (SA).

¹⁶⁵ No. 87 of 1981. See Reprint No. 26, as in force at November 7 2007. This Act was originally modelled on the New South Wales *Limitation Act 1969*.

¹⁶⁶ Section 48(3)(b), *Limitation Act 1936* (No. 1168 of 1938), January 18 2007. See Handford *Limitation of Actions: The Laws of Australia* (2nd ed 2007), at 118-119.

¹⁶⁷ Section 48(3b), *Limitation Act 1936* (No. 1168 of 1938), January 18 2007.

- i) That facts material¹⁶⁸ to the plaintiffs case were not ascertained by him until some time after 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
- ii) That the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances.¹⁶⁹

6.76 Unlike the Northern Territory, however, the Southern Australian Act does not contain any special provisions for defamation actions, which therefore fall under the general extension provision.

(f) Tasmania

6.77 The Tasmanian *Limitation Act 1974 (Tasmania)*,¹⁷⁰ as amended,¹⁷¹ makes provision for the extension of the limitation period applicable to personal injuries actions. The provision that applies depends on the date of accrual of the personal injuries action: section 5(3) applies to actions that accrued before January 1 2005;¹⁷² while section 5A(5) applies to actions accruing thereafter.

6.78 Under section 5(3), a judge may extend the limitation period as he or she thinks necessary, but the period within which the judge determines that the

¹⁶⁸ As to what constitutes "material facts" see section 48(3a); *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628; *Napolitano v Coyle* (1977) 15 SASR 559; *Wright v Donatelli* (1995) 65 SASR 307 (FC); *Lovett v Le Gall* (1975) 10 SASR 479 (FC); *Berno Bros Pty Ltd v Green's Steel Constructions Pty Ltd* (1992) 84 NTR 1; 107 FLR 279; Handford *Limitation of Actions: The Laws of Australia* (2nd ed 2007), at 118-119.

¹⁶⁹ Section 48(3)(b), *Limitation Act 1936* (No. 1168 of 1938), version of January 18 2007. See further Handford *Limitation of Actions: The Laws of Australia* (2nd ed 2007), at 118.

¹⁷⁰ No. 98 of 1974. This Act resulted from the Tasmania Law Reform Committee's *Report on Limitation of Actions* (1973). The Act adopted the reforms implemented in the English *Limitation Act 1939* and certain of the provisions of the English 1954 Act on personal injuries.

¹⁷¹ See Schedule 1, *Table of Amendments*. See also Tasmania Law Reform Commission *Limitation of Actions for Latent Personal Injuries* (Report No. 69, 1992).

¹⁷² Date of commencement of the *Limitation Amendment Act 2004*.

action may be brought may not exceed a period of 6 years from the date of accrual. This constitutes a maximum three-year extension, as the limitation period for actions accruing before 2005 is three years running from the date of accrual.¹⁷³ There is no statutory list of factors to take into consideration.¹⁷⁴ The judge may only extend the limitation period if he thinks that in all the circumstances of the case it is “just and reasonable” to do so.¹⁷⁵ The judge’s discretion can be exercised even if the initial three-year limitation period has expired.¹⁷⁶

6.79 Personal injuries actions accruing after January 1 2005 are subject to a three-year limitation period running from the date of discoverability, and a 12-year long-stop running from the date of the act or omission giving rise to the cause of action.¹⁷⁷ Under section 5A(5) of the 1974 Act,¹⁷⁸ a judge may extend the limitation period for personal injuries actions to the expiry of three years from the date of discoverability.¹⁷⁹ Thus, the broad discretion available prior to the 2004 amendments has been reduced to a wide discoverability rule.

(g) Victoria

6.80 The limitation of actions in Victoria is primarily governed by the *Limitation of Actions Act 1958 (Victoria)*, as amended.¹⁸⁰

¹⁷³ Section 5(1), *Limitation of Actions Act 1974* (No. 98 of 1974).

¹⁷⁴ But see *Knight v Smith* [1975] Tas SR 83 (FC), where Neasy J (Green CJ and Chambers J concurring) held that the court might taken into account factors such as whether and to what extent the defendant suffered prejudice by the delay; whether the plaintiff had an arguable case; and whether there was a satisfactory explanation for the delay.

¹⁷⁵ Section 5(3), *Limitation of Actions Act 1974* (No. 98 of 1974).

¹⁷⁶ *Ibid* at section 5(4).

¹⁷⁷ *Ibid* at section 5A(3).

¹⁷⁸ Introduced by the *Limitation Amendment Act 2004* (No. 66 of 2004).

¹⁷⁹ Section 5A(5), *Limitation of Actions Act 1974* (No. 98 of 1974).

¹⁸⁰ No. 6295 (Vic) (version 090, 31 December 2007). This Act consolidated the *Limitation of Actions Act 1955* (Vic) and the *Limitation of Actions (Extension) Act 1956* (Vic). These Acts resulted from the Victoria Statute Law Revision Committee *Report on the Limitation of Actions Bill* (1949), which was based on the recommendations of the Wright Committee Report (1936).

(i) Personal Injuries

6.81 The 1958 Act has undergone several reviews¹⁸¹ and numerous amendments¹⁸² in relation to personal injuries actions. Two limitation regimes are now contained within the 1958 Act: Part II governs acts or omissions occurring before 21 May 2003; Part IIA governs acts or omissions occurring on or after 21 May 2003.¹⁸³ Part IIA applies to all actions for personal injury or death commenced on or after 1 October 2003.¹⁸⁴

6.82 Section 23A of the 1958 Act¹⁸⁵ allowed for the extension of the limitation period applicable to personal injuries actions. This extension could be applied where the court considered it “just and reasonable” to do so.¹⁸⁶ The extension was available for such period as the court determined.¹⁸⁷ The court was mandated to have regard to “all the circumstances of the case”, including the following non-exhaustive list.¹⁸⁸

6.83 Part IIA of the 1958 Act, which was introduced in 2003,¹⁸⁹ resulted from the “Ipp Report”.¹⁹⁰ Two limitation periods now apply to actions for

¹⁸¹ See e.g. Victorian Chief Justice’s Law Reform Committee *Report on Limitation of Actions in respect of Personal Injuries and Death* (1972); Victorian Chief Justice’s Law Reform Committee *Report on Limitation of Actions in Personal Injuries Claims* (1981).

¹⁸² See e.g. *Limitation of Actions (Personal Injuries) Act 1972* (Vic)(No. 8300); *Limitation of Actions (Personal Injuries Claims) Act 1983* (Vic.)(No. 9884); *Limitation of Actions (Amendment) Act 1989* (Vic)(No. 21); *Limitation of Actions (Amendment) Act 2002* (Vic) (No. 52).

¹⁸³ Section 27N, *Limitation of Actions Act 1958* (Vic)(No. 6295; version 090, 31.12.2007).

¹⁸⁴ *Ibid* at section 27N, irrespective of whether the act or omission complained of occurred before or after May 21 2003.

¹⁸⁵ Inserted by section 3, *Limitation of Actions (Personal Injuries) Act 1972* (Vic)(No. 8300); substituted by section 5, *Limitation of Actions (Personal Injuries Claims) Act 1983* (Vic.)(No. 9884).

¹⁸⁶ Section 23A(2), *Limitation of Actions Act 1958* (Vic)(No. 6295).

¹⁸⁷ *Ibid* at section 23A(2).

¹⁸⁸ Section 23A(3), *Limitation of Actions Act 1958* (Vic)(No. 6295). See further Handford *Limitation of Actions: The Laws of Australia* (2nd ed 2007), at 132-133.

¹⁸⁹ *Wrongs and Limitation of Actions (Insurance Reform) Act 2003* (Vic)(No. 60 of 2003).

personal injury or death: a basic limitation period of three years running from discoverability,¹⁹¹ and a long-stop period of 12 years running from the date of the act or omission giving rise to the cause of action.¹⁹² Special limitation periods are provided for persons suffering under a disability,¹⁹³ survivor actions,¹⁹⁴ wrongful death actions,¹⁹⁵ and actions by minors injured by close relatives or close associates.¹⁹⁶

6.84 The court may extend the limitation periods applicable to any of these actions for such period as it determines, provided that it decides that it is “just and reasonable” to do so.¹⁹⁷ The court is mandated to have regard to “all the circumstances of the case”, including a non-exhaustive list.¹⁹⁸ This list of factors, with the exception of factor (e), mirrors those to which the court was to have regard under section 23A. A novel provision is contained, however, in section 27L(2), which provides that “to avoid doubt”, the court may have regard to the following circumstances:¹⁹⁹

- a. Whether the passage of time has prejudiced a fair trial of the claim;
- b. The nature and extent of the plaintiff's loss; and
- c. The nature of the defendant's conduct.

(ii) Defamation

6.85 The law of defamation and the limitation of defamation actions in Victoria was overhauled by the *Defamation Act 2005 (Victoria)*.²⁰⁰ As a result

¹⁹⁰ Review Panel of the Australian Commonwealth *Review of the Law of Negligence: Final Report* (September 2002) (“the Ipp Committee Report”).

¹⁹¹ As to “discoverability”, see section 27F, *Limitation of Actions Act 1958* (Vic)(No. 6295; version 090, 31.12.2007).

¹⁹² Section 27D(1), *Limitation of Actions Act 1958* (Vic)(No. 6295; version 090, 31.12.2007). Inserted by section 14, *Wrongs and Limitation of Actions (Insurance Reform) Act 2003* (Vic)(No. 60 of 2003).

¹⁹³ *Ibid* at section 27E.

¹⁹⁴ *Ibid* at section 27G.

¹⁹⁵ *Ibid* at section 27H.

¹⁹⁶ *Ibid* at section 27I.

¹⁹⁷ *Ibid* at section 27K.

¹⁹⁸ *Ibid* at section 27L.

¹⁹⁹ *Ibid* at section 27L(2).

²⁰⁰ No. 75 of 2005 (version as at 9 December 2007).

of amendments made by this Act, the 1958 Act sets a one-year limitation period for defamation actions, running from the date of publication.²⁰¹ This limitation period may be extended for up to three years running from the date of publication²⁰² Such an extension may only be granted if the court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced the action within the original one-year limitation period.²⁰³

(h) Western Australia

6.86 The law of limitation in Western Australia is currently governed by the *Limitation Act 2005 (Western Australia)*.²⁰⁴ The Act allows for the extension of the limitation period in the following cases:

- personal injuries and wrongful death actions (based primarily on discoverability principles);
- defamation actions;
- fraud or improper conduct;
- actions by a person who was under 18 at the date of accrual; and
- actions by person with a mental disability.²⁰⁵

6.87 The Act sets a one-year limitation period for defamation actions, running from the date of publication.²⁰⁶ It allows for the extension of that limitation period if the courts are satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the publication.²⁰⁷ An action relating to the publication of defamatory matter cannot be commenced if 3 years have elapsed since the publication.²⁰⁸

²⁰¹ Section 5(1AAA), *Limitation of Actions Act 1958* (Vic)(No. 6295; version 090, 31 December 2007).

²⁰² *Ibid* at section 23B.

²⁰³ *Ibid* at section 23B(2).

²⁰⁴ No. 19 of 2005. This Act replaced the *Limitation Act 1935* (WA), which has now been repealed (with savings) by the *Limitation Legislation Amendment and Repeal Act 2005* (WA)(No. 20 of 2005).

²⁰⁵ Division 3 (sections 38-42), *Limitation Act 2005* (WA)(No. 19 of 2005).

²⁰⁶ Section 15, *Limitation Act 2005* (WA)(No. 19 of 2005).

²⁰⁷ *Ibid* at section 40(2).

²⁰⁸ *Ibid* at section 40(3).

6.88 When deciding, in an extension application, whether to extend the time for the commencement of an action, a court is to have regard to —

- (a) whether the delay in commencing the proposed action, whatever the merit of the reasons for that delay, would unacceptably diminish the prospects of a fair trial of the action; and
- (b) whether extending the time would significantly prejudice the defendant (other than by reason only of the commencement of the proposed action).²⁰⁹

(i) Recommendations in 1982

6.89 In 1982, the Law Reform Commission of Western Australia recommended that instead of introducing a discoverability rule, the limitation period should not apply where the court determined that its application would be “unjust”.²¹⁰ The focus of the court should, it suggested, be upon the justice of the case in the circumstances. The WA Commission essentially recommended the introduction of something similar to the discretion allowed for under the UK *Limitation Act 1975*, without the discoverability provisions that accompanied that discretion.

6.90 The Commission set out statutory criteria which would assist the court in making this decision. Thus, the justice of the case would be determined by the court in light of all the circumstances, including the following:

- a) The reasons why the plaintiff did not commence the action within the statutory limitation period, including that there was a significant people of time after the cause of action accrued during which the plaintiff neither knew nor ought reasonably to have known that he or she had suffered the injury giving rise to the cause of action.
- b) The steps taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received
- c) The extent to which the plaintiff acted promptly and reasonably once he or she knew that the alleged act or omission of the defendant might be capable at that time of giving rise to an action for damages
- d) The conduct of the defendant after the cause of action accrued relevant to the commencement of proceedings by the plaintiff

²⁰⁹ *Ibid* at section 40(4).

²¹⁰ Law Reform Commission of Western Australia *Report on Limitation and notice of actions: latent disease and injury* (Project No. 36(I), 1982), at paragraphs 4.25-4.32.

- e) The extent to which the defendant may be prejudiced in defending the action, other than relying on a defence of limitation, if the limitation period does not apply,
- f) Alternative remedies available to the plaintiff if the limitation period applies.
- g) The duration of any disability of the plaintiff whether arising before or after the cause of action accrued.²¹¹

6.91 The *Limitation Act 1935* (WA) was amended in 1983 to cater for persons who have contracted “a latent injury that is attributable to the inhalation of asbestos”. This amendment was narrow, in light of the Commission’s recommendations and by comparison to legislative amendments in other Australian jurisdictions.²¹²

(ii) Recommendations in 1997

6.92 In its 1997 Report, the Law Reform Commission of Western Australia recommended that a “very narrow discretionary power” to extend the limitation period should be introduced as a central feature of the core regime. The limitation period or long-stop period could be extended by the courts “in the interests of justice”, but only in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal litigation period has expired, and the general public interest in the finality of litigation, are outweighed by other factors.²¹³

6.93 The Commission set out the following eight factors that could be taken into account by the courts in exercising its discretion:

- i. The length and reasons for delay on the part of the plaintiff,
- ii. The extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
- iii. The nature of the plaintiff’s injury;
- iv. The position of the defendant;
- v. The conduct of the defendant;

²¹¹ Law Reform Commission of Western Australia *Report on Limitation and notice of actions: latent disease and injury* (Project No. 36(I), 1982), at 55-56; Law Reform Commission of Western Australia *30th Anniversary Report Implementation Report* (2002), at 119.

²¹² Law Reform Commission of Western Australia *30th Anniversary Report Implementation Report* (2002), at 119.

²¹³ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No. 36 II, 1997), at paragraph 7.40.

- vi. The duration of the disability of the defendant arising on or after the date of discoverability;
- vii. The extent to which the plaintiff and defendant acted properly and reasonably once the injury became discoverable; and
- viii. The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.²¹⁴

6.94 This list is rather more extensive than those listed in section 33 of the English *Limitation Act 1980*, and deals with factors other than the latency of damage. Even though the Western Australia Commission suggested that the discretion should be “very narrow”, it is phrased in wide, unrestricted terms.

(5) New Zealand

6.95 Under the New Zealand Law Commission’s consultation draft of a *Limitation Defences Bill 2007*, the two-year primary limitation period applicable to claims in respect of abuse or bodily injury may be extended up to a duration of six years.²¹⁵ The parties may agree to alter the length of the applicable limitation period, the time at which the defendant could raise the limitation defence, vary or add to the circumstances in which the defendant could raise a defence.²¹⁶ The court or tribunal may make an extension subject to any conditions it thinks just to impose, but only if satisfied that the delay in making the claim was occasioned by a mistake, or by any other reasonable cause.²¹⁷

6.96 This ability to extend the period is similar to the court’s power under the proviso to section 4(7) of the New Zealand *Limitation Act 1950*, which relates to actions in respect of bodily injury.

(6) Canada

6.97 There is no judicial discretion to extend the limitation period under the core regimes adopted in Alberta, Ontario, and Saskatchewan, or under the ULCC Model Limitations Act of 2005. As seen above, all of these pieces of legislation have emanated from the ground-breaking recommendations of the

²¹⁴ *Ibid* at paragraph 7.40.

²¹⁵ Clause 12, *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). See also Clause 7(3), *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007). Such an extension may only be made by a court or tribunal in which the relevant proceeding has been commenced and an application was made to that court or tribunal for that purpose, or by agreement of the parties in accordance with clause 38 of the draft Bill. See clauses 12(2) and 38 of the Draft.

²¹⁶ Clause 38(1), *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

²¹⁷ Clause 12(3), *Consultation Draft: Limitation Defences Bill 2007* (NZLC 69, 2007).

Alberta Law Reform Institute.²¹⁸ In its 1986 Discussion Paper, that Institute stated that where a discoverability rule alone was introduced as the starting point for the running of the basic limitation period, judicial discretion to extend the limitation period is unnecessary:-

“If a discovery period if applicable, a claimant will not be exposed to the risk that his claim will be barred before he could have discovered it with the exercise of reasonable diligence. For claims subject to the discovery rule, we will recommend a limitation period of sufficient duration to give even a relatively unsophisticated claimant ample time in which to attempt to settle his controversy with the defendant and to bring a claim when necessary. We are not prepared to go further, for we believe that to go further would sacrifice the objectives of a limitations system.”²¹⁹

6.98 Judicial discretion to extend the limitation period does, however, apply in Manitoba and in Nova Scotia.

(a) Manitoba

6.99 Under Part II of the Manitoba *Limitation Act 1987 (Manitoba)*,²²⁰ the courts have discretion to grant the plaintiff leave to proceed out of time if the court is satisfied that not more than 12 months elapsed between:

- a) The date on which the applicant first knew or ought to have known of all the material facts of a decisive character upon which the action is based, and
- b) The date of the application for leave.²²¹

6.100 This discretion is based on discoverability principles - there is no alternative statutory discoverability provision.

6.101 Once the court has granted leave to begin an action, the court will then fix a period within which the applicant must begin the action. If the applicant fails to comply with this time-limit, the order granting leave will expire and cease to have effect.²²² The discretion is not unfettered - a long-stop

²¹⁸ See Alberta Institute of Law Research and Reform *Limitations* (Report No. 55, December 1989) and *Limitations* (Report for Discussion No. 4, 1981).

²¹⁹ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, September 1986), at paragraph 2.154.

²²⁰ C.C.S.M. c. L150.

²²¹ Section 14(1), *Limitation of Actions Act RSM 1987* CCSM c. L150.

²²² *Ibid* at section 14(5).

provision applies to the exercise of the discretion. The court may not grant leave to bring an action, or to continue an action that has been begun more than 30 years after the occurrence of the acts or omissions that gave rise to the cause of action.²²³

6.102 In its recent *Draft Report for Consultation* on the Limitation of Actions Act, the Manitoba Law Reform Commission noted that none of the modern Canadian limitations regimes have included a residual discretion of the nature that is available under the 1987 Act, and the general consensus in Canada appears to be that permitting courts to waive or extend limitations creates too much uncertainty.²²⁴ The Commission recommended that its proposed Limitation Act should not retain discretion in a court to extend a limitation, on the following reasoning:

“The Commission is not persuaded that there is sufficient reason to leave the Court any residual discretion to extend a limitation. Permitting any discretion simply invites applications to extend, unnecessarily increasing both the burden on the courts and the cost and unpredictability of litigation. The potential difficulties created by such a provision are too great to make additional discretion desirable, and the flexibility built into the new limitations regime is sufficiently broad in any event.”²²⁵

(b) Nova Scotia

6.103 The Nova Scotia *Limitation of Actions Act 1989*²²⁶ provides a general extension provision based entirely on discretion. Under this provision, a court may disallow a defence based on time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which:

- (1) The time limitation prejudices the plaintiff or any person whom he represents; and
- (2) Any decision of the court would prejudice the defendant or any person whom he represents, or any other person.²²⁷

²²³ *Ibid* at section 14(4).

²²⁴ Manitoba Law Reform Commission *The Limitation of Actions Act: Draft Report for Consultation* (15 June 2009) at 33.

²²⁵ Manitoba Law Reform Commission *The Limitation of Actions Act: Draft Report for Consultation* (15 June 2009) at 33.

²²⁶ Section 3(2), *Limitation of Actions Act 1989* (NS).

²²⁷ *Ibid* at section 3(2).

6.104 The court is to have regard to all the circumstances of the case, and in particular to a list of factors similar to those contained in section 33 of the English *Limitation Act 1980*.²²⁸ The court cannot exercise jurisdiction where an action is commenced or notice is given more than four years after the limitation period expires.²²⁹ The provision does not apply where the initial limitation period has expired, or where the initial limitation period is ten years or more in length.²³⁰

(7) Summary

6.105 With few exceptions, judicial discretion has been introduced only in respect of the limitation periods applicable to personal injuries, wrongful death and defamation actions. In the Australian Capital Territory, discretion is available with respect to actions involving latent property damage.²³¹ The Northern Territory, South Australia and Manitoba have provisions allowing for discretion in all civil actions,²³² while British Columbia allows time limits to be extended in a wide range of civil actions.²³³ In contrast, in Canada,²³⁴ New Zealand²³⁵ and the United States,²³⁶ the courts have held that causes of action

²²⁸ *Ibid* at section 3(4).

²²⁹ Section 3(6), *Limitation of Actions Act 1989* (NS).

²³⁰ Section 3(7)(a), *Limitation of Actions Act 1989* (NS).

²³¹ Section 40, *Limitation Act 1985* (A1985-66); Republication No. 16 of April 12 2007.

²³² Section 44, *Limitation Act 1981* (NT); section 48, *Limitation of Actions Act 1936* (SA); section 14(1), *Limitation of Actions Act 1987* (Man).

²³³ Section 6(3), *Limitation Act 1979* (BC).

²³⁴ *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 (Supreme Court of Canada). As a result of this decision, the discoverability principle is now of general application. See *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 (Supreme Court of Canada); *KM v HM* (1992) 96 DLR (4th) 289 (Supreme Court of Canada).

²³⁵ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (New Zealand Court of Appeal); upheld by the Privy Council at [1996] 1 NZLR 513. Here, the plaintiff suffered economic loss when the market value of property became depreciated as a result of a defect in the property. The Privy Council affirmed the proposition that the cause of action arose when this defect became reasonably discoverable. See further *G D Searle & Co v Gunn* [1996] 2 NZLR 129; *S v G* [1995] 3 NZLR 681.

accrue only when damage is discoverable. Discoverability is, therefore, of general application in these jurisdictions, even in the absence of an ultimate limitation period. It has been considered unnecessary to introduced judicial discretion to extend the limitation period in cases such as professional negligence, economic loss, or defective buildings.

D The Merits and Drawbacks of Judicial Discretion

6.106 While the incorporation of judicial discretion into limitations law has been criticised,²³⁷ it has the merit of allowing delay in the commencement of proceedings to be excused for non-discoverability reasons.²³⁸ Thus, where the strict application of the “date of knowledge” test causes injustice, a court does not have to apply an unnatural construction to the meaning of that test in order to avoid the injustice.

(1) Merits

6.107 The primary advantages of judicial discretion are simplicity and flexibility. Judicial discretion is much simpler than legislative provisions based on discoverability, as can be seen from the evolution in the UK between the *Limitation Act 1963* and the *Limitation Acts 1975 and 1980*. The argument that judicial discretion will lead to excessive delay may be countered by the argument that it remains in the plaintiff’s best interest to pursue his claim expeditiously.²³⁹

6.108 Judicial discretion allows judges to balance the numerous factors involved and the hardships caused to plaintiff and defendant. It does not necessarily sacrifice consistency.²⁴⁰ The Law Reform Commission of Western Australia reported in 1997 that experience with discretion-based provisions in Victoria, A.C.T., and New South Wales had shown that the courts are able to use such provisions to do justice without producing uncertainty and inconsistency.²⁴¹ Even if it does create uncertainty, it may be argued, as noted

²³⁶ See further Law Reform Commission *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC- 21, 1987) at 28-34; *Urie v Thompson* (1949) 337 US 163.

²³⁷ See Davies “Limitations of the Law of Limitation” (1982) 98 LQR 249.

²³⁸ Law Reform Commission of Western Australia *Report on Limitation and Notice of Actions* (Project No 36 (II), 1997) at paragraph 3.9.

²³⁹ Law Reform Commission of Western Australia *Report on Limitation and notice of actions: latent disease and injury* (Project No. 36(I), 1982) at paras 4.12-4.20.

²⁴⁰ *Firman v Ellis* [1978] QB 886, 905 (Lord Denning MR).

²⁴¹ Law Reform Commission of Western Australia *Report on Limitation and notice of actions* (Project No. 36(II), 1997) at paragraph 5.49.

by Ormrod LJ in *Firman v Ellis*,²⁴² that “uncertain justice is preferable to certain injustice”.²⁴³ Rules that operate to a high degree of certainty are often unduly rigid, and may be excessively technical. Flexibility has the advantage of fairness to the claimants, who will not be prejudiced by the expiry of a limitation period before they had sufficient opportunity to commence a claim.

(2) Drawbacks

6.109 As a corollary of the flexibility that it creates, judicial discretion has the potential to generate uncertainty. Certainty is, of course, one of the primary functions of a limitations system. Where a judge has discretion to extend or dis-apply a limitation period, the defendant is not certain as to when a claim can no longer be brought against him. The defendant can therefore face liability for an indefinite period of time, spanning decades after the events giving rise to a potential claim. Such uncertainty may lead to higher insurance costs as it becomes more difficult and more expensive to insure against claims where the liability is essentially open-ended.

6.110 Additionally, it might be said that judicial discretion could undermine the effectiveness of a fixed limitation period as a means of encouraging plaintiffs not to sleep on their rights. Moreover, it may cause a general slowing down of the process of proceeding with claims.²⁴⁴

6.111 The introduction of judicial discretion also generates problems of interpretation, particularly as statutory guidelines aimed at directing the exercise of discretion cannot always be clearly and simply drafted, given that the aim of the discretion in the first place is to ensure flexibility. Discretion therefore has the potential to lead to divergent approaches between judges and courts, as a result of different ideas of the equity of a given situation. This may cause confusion and lead to prolonged and unnecessary litigation.

6.112 Further, the Law Reform Commission of Western Australia in 1997 reported that:

“[t]he experience of jurisdictions which deal with the problem of latent damage by giving the courts a discretion suggests that the discretion is practically always exercised in favour of the plaintiff, particularly in

²⁴² *Firman v Ellis* [1978] QB 886.

²⁴³ *Ibid* at 911

²⁴⁴ Law Reform Commission of Western Australia *Report on Limitation and notice of actions: latent disease and injury* (Project No. 36(l), 1982) at paragraphs 4.12-4.20

cases where the plaintiff did not acquire the requisite knowledge within the limitation period.”²⁴⁵

6.113 Moreover, in many jurisdictions it is necessary to make an application to the court for an extension of the limitation period, or for the period to be disregarded. This adds delay and expense to a litigation process that is already invariably slow and costly.

E Conclusion and Provisional Recommendations

6.114 The Commission agrees with the observations of the Alberta Institute with regard to the absence of a necessity for judicial discretion in circumstances where a regime incorporating a short basic limitation period and a longer ultimate limitation period, supplemented by rules governing postponement, is formulated. The advantage of certainty that is the product of the formulation of such a regime would be unnecessarily weakened in the event that judicial discretion to extend or dis-apply the limitation period were to be introduced as a feature of the regime. Moreover, the additional costs, delay and unnecessary litigation that would inevitably result, albeit only in the initial years of the exercise of such discretion, seems anathema to the objective of introducing a simplified, straightforward, comprehensible limitations regime. The Commission has previously expressed the view that reliance on judicial discretion in the application of limitation law would result in unnecessary uncertainty,²⁴⁶ and it remains firmly of that view.

6.115 The Commission is of the view that there is a real danger that if such discretion was introduced, a practice would be likely to develop in the great majority of cases of exercising that discretion in favour of the plaintiff. It is also considered that judicial discretion would be unnecessary if an ultimate limitation period was available and particularly in the light of the additional levels of flexibility and protection for defendants that result from the courts’ inherent discretion to dismiss claims for want of prosecution even before the statutory limitation period has expired.

6.116 *The Commission provisionally recommends that if the proposed new legislation governing limitation of actions limitation contains a short basic limitation period and a longer ultimate limitation period, supplemented by rules governing postponement, it need not include a provision allowing for judicial discretion to either extend or dis-apply the limitation period.*

²⁴⁵ *Ibid* at paragraph 7.17.

²⁴⁶ Law Reform Commission *Report on Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64, 2001) at paragraph 4.11.

6.117 In light of its recent enactment, the Commission does not propose to make any recommendations on the limitation periods in the *Defamation Act 2009*.

CHAPTER 7 DISMISSAL OF CLAIMS FOR WANT OF PROSECUTION

A Introduction

7.01 The courts have an inherent discretion to dismiss or strike out claims for ‘want of prosecution’. This is a facet of the courts’ inherent jurisdiction to control their own procedure¹ and is discretionary in nature.² The rationale for this inherent jurisdiction is analogous to the rationale that underpins limitations law: as a result of the delay, the defendant can no longer reasonably be expected to defend the claim; put simply, “the chances of the courts being able to find out what really happened are progressively reduced as time goes on.”³

7.02 The jurisdiction to dismiss for want of prosecution is distinct from the courts’ power under the Rules of Court to dismiss claims at particular times (e.g. failure to deliver a statement of claim,⁴ failure to give notice of trial,⁵ lack of proceedings for two years,⁶ or where the pleadings disclose no reasonable cause of action, or are frivolous or vexatious.⁷) It is also distinct from the courts’ power to dismiss a case that is ‘bound to fail’.⁸

¹ *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 475.

² *Ó Domhnaill v Merrick* [1984] IR 151, 165.

³ *J O’C v Director of Public Prosecutions* [2000] 3 IR 478, 499-500.

⁴ Order 27, rule 1 of the Rules of the Superior Courts (RSC). Should be delivered within 21 days of entry of appearance (O 20, r 3, RSC).

⁵ Order 36, rule 12(b), RSC. Should be given within six weeks after close of pleadings (O 36 r 12, RSC).

⁶ Order 122, rule 11, RSC.

⁷ Order 19, rule 28 RSC. See further *Delaney Striking out where No Reasonable Cause of Action, where Claim Frivolous or Vexatious or where Clearly Unsustainable* (2000) 18 ILT 127.

⁸ See *Barry v Buckley* [1989] IR 306; *Sun Fat Chun v Osseous Ltd* [1992] 1 IR 425; *Wicklow County Council v O’Reilly & ors* [2007] IEHC 71.

7.03 In this Chapter, the Commission examines this inherent jurisdiction against the general background of the law on limitation of actions. In Part B, the Commission examines the general principles that have guided the courts for many years in applying this inherent jurisdiction. In Part C, the Commission examines recent case law which may indicate some changes in the manner in which these general principles are applied by the courts. In Part D, the Commission notes that a stricter approach to delay has been applied by the courts having regard to considerations arising under the Constitution and the European Convention on Human Rights. In Part E, the Commission notes the connection between this jurisdiction and the *Statute of Limitations*, noting the differing approaches to dismissal of cases for want of prosecution where, on the one hand, delay was incurred prior to the commencement of proceedings (pre-commencement delay) and, on the other hand, delay was subsequently incurred in the prosecution of the claim (post-commencement delay). In Part F, the Commission sets out its conclusions and provisional recommendation on this issue.

B General Principles

7.04 Want of prosecution arises where, owing to inordinate and inexcusable delay, there has been an extreme lapse of time that would cause or is likely to cause prejudice to the defendant in the conduct of his defence.⁹

7.05 A two-step test must be followed before the courts can dismiss a claim.¹⁰ First, it must be considered whether or not the delay in question is both inordinate and inexcusable.¹¹ The onus of establishing inordinate and inexcusable delay lies on the party seeking to have the claim dismissed, which is usually the defendant.¹² The prediction of what period of inactivity will constitute ‘inordinate delay’ remains an inexact science, with each case being

⁹ See e.g. *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459; *Ó Domhnaill v Merrick* [1984] IR 151; *Toal v Duignan* [1991] ILRM 140.

¹⁰ The *locus classicus* in this regard is *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 but the groundwork was laid in 1979 in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561. For a summary of the principles applicable in civil proceedings, see *J O’C v Director of Public Prosecutions* [2000] 3 IR 478, 499-500; this re-statement of the law was deemed “very pertinent” in *Shanahan & Others v PJ Carroll Ltd* [2007] IEHC 229.

¹¹ *Rainsford v Limerick Corporation* [1995] 2 ILRM 561, 567; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 467.

¹² *Rainsford v Limerick Corporation* [1995] 2 ILRM 561, 567; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 466.

decided on its own merits. The courts have given no general indication of how long the delay must be to qualify as inordinate.¹³ It is significant that in general, inordinate periods of delay will be considered 'excusable' by virtue of the fact that the statutory limitation period applicable to the claim had not yet expired at the time at which the delay was incurred.¹⁴ This is further discussed below (see page 313).

7.06 If the delay has not been inordinate and inexcusable, there are no real grounds for dismissing the proceedings.¹⁵ Once the cumulative requirements of inordinate and inexcusable delay are fulfilled, however, the courts must weigh up the "balance of justice", and thereby attempt to strike a balance between the competing rights of the parties.¹⁶ The courts will be influenced by the concepts of fairness and justice, and must balance the interests of both litigants i.e. 'whether it is fair to the defendant to allow the action to proceed and whether it is just to the plaintiff to strike out the action'.¹⁷ The importance of this balancing process was stressed in *Dowd v Kerry County Council* where Ó Dálaigh CJ stated that 'in weighing the extent of one party's delay, the court should not leave out of account the inactivity of the other party...[I]itigation is a two-party operation and the conduct of both parties should be looked at'.¹⁸

7.07 A list of the factors that may be taken into account was set out in *Primor Ltd v Stokes Kennedy Crowley*.¹⁹ Such factors include the nature of the case, the type of claim advanced, the extent of the defendant's indemnity, the conduct of the parties, the complexity of the arguments, whether or not the claim was such that it required investigation immediately after the event, or whether or not there claim was based on physical evidence and, if so, whether the evidence had been or could be preserved over a reasonable period pending trial,²⁰ and the excuse tendered with respect to the delay.²¹

¹³ *Abrahamson Developments in Delay - no more comfortable assumptions* (2006) 2(2) JCPP 2.

¹⁴ See *Southern Mineral Oil Limited (in liquidation) v Coonev* [1997] 3 IR 549, 571.

¹⁵ *Rainsford v Limerick Corporation* [1995] 2 ILRM 561, 567.

¹⁶ *Ibid* at 567.

¹⁷ *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 466.

¹⁸ *Dowd v Kerry County Council* [1970] IR 27, 41-42.

¹⁹ *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 475.

²⁰ *Rainsford v Limerick Corporation* [1995] 2 ILRM 561, 570-1.

²¹ *Stephens v Paul Flynn Ltd* [2005] IEHC 148.

7.08 When considering the balance of justice, the courts will consider the degree to which the defendant has been prejudiced by the delay.²² Prejudice may be of varying kinds: it may relate to the trial of the issue, the defendants' liability²³ and/or business interests, or the damages to be recovered. In addition to *actual* or *specific* prejudice, a defendant may rely on *general* or *presumed* prejudice. A delay will be considered prejudicial if it will necessarily create an injustice to the defendant.²⁴ The prejudice must be "so extreme that it would be unjust to call upon a particular defendant to defend himself or herself".²⁵ As a general rule, it is accepted that "the longer the delay, the greater the likelihood of serious prejudice at the trial."²⁶

7.09 The prejudice suffered by the defendant may be in the nature of stress and anxiety. It is noteworthy, albeit that it related to prosecutorial delay in criminal proceedings, that in a recent judgment of the Supreme Court in *Cormack and Farrell v DPP & Ors*, Kearns J. found that an applicant must demonstrate "something more than the predictable levels of anxiety that any citizen would feel in the face of an impending trial."²⁷ He noted that it may be helpful if medical evidence is furnished in support of a contention that an applicant has suffered a particular level of stress and anxiety in the particular circumstances of his or her case,²⁸ but he held that it is not a matter of looking at the degree of anxiety in a quantitative sense, requiring proof thereof, and it not necessary for an applicant to meet a threshold of having to establish or prove a form of psychiatric illness and he remarked that it would be "most unfortunate" if cases relating to prosecutorial delay came to be determined by reference to some form of context between doctors called by various parties.²⁹

²² *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 466.

²³ *Allen v Sir Alfred McAlpine Sons & anor* [1968] 2 QB 229, 268.

²⁴ See *J.O'C. v The Director of Public Prosecutions* [2000] 3 I.R. 478, 499-500.

²⁵ *Southern Mineral Oil Limited (in liquidation) v Coonev* (1997) 3 IR 549, 562.

²⁶ *Allen v Sir Alfred McAlpine Sons & anor* [1968] 2 QB 229, 269.

²⁷ *McCormack v DPP & ors and Farrell v DPP* [2008] IESC 63. Kearns J. expressly agreed with the decision of Edwards J. in the High Court. He also cited a similar view expressed by Fennelly J. giving the majority judgment of the Supreme Court in *O'H v DPP* [2007] 3 IR 299.

²⁸ *Ibid.* Kearns J. gave the example of "an offence alleged to have occurred in a small rural community where the applicant's identity would be well known, or in the case of an elderly applicant who might in addition be afflicted with other medical problems likely to be exacerbated by stress and anxiety."

²⁹ *McCormack v DPP & ors and Farrell v DPP* [2008] IESC 63.

7.10 The general principles applicable to the exercise of the court's inherent jurisdiction to dismiss for want of prosecution are, at this stage, well established. There has, however, recently been something of a fresh approach to the weight that is to be attached to the various factors that are weighed in the balance, particularly in light of the incorporation into Irish law of the European Convention on Human Rights.

C Recent Developments

7.11 Recent case law suggests a new departure in terms of the degree to which the courts will excuse lengthy delays. Giving the judgment of the Supreme Court decision in the case of *Gilroy v Flynn* in 2004, Hardiman J. noted that there have been "significant developments" in the law relating to the courts' inherent jurisdiction to dismiss stale claims since the High Court gave judgment in *Rainsford v Limerick Corporation* and *Primor Ltd v Stokes Kennedy Crowley*.³⁰ He listed in particular the following three developments:

- i) The amendment of Order 27, rule 1, RSC;
- ii) Increased awareness of the consequences of delay;
- iii) The obligation of the Courts - following cases such as *McMullen v Ireland* and the *European Convention on Human Rights Act 2003* - have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.

7.12 Hardiman J. then continued as follows:-

"These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."³¹

7.13 The evolution of the approach of the courts to the length of time which may be considered "inordinate", and the factors upon which that evolution has been based, including those set out by Hardiman J. in *Gilroy v Flynn*, are indicative of the attitudes prevailing on a broader scale in relation to the limitation of actions in general and, in that context, merit closer consideration.

³⁰ *Gilroy v Flynn* [2005] 1 ILRM 290. Denham and Fennelly JJ. concurred.

³¹ *Ibid.*

(1) Amendment of Order 27 RSC

7.14 Rule 1 of Order 27 of the Rules of the Superior Courts regulates the dismissal of proceedings where the plaintiff has failed to deliver a statement of claim. In reality, a statement of claim is very rarely, if ever, delivered within the time limit set out in the Rules, i.e. within 21 days of the entry of an appearance. Prior to 2004, plaintiffs were routinely granted an extension of time to deliver the statement of claim, albeit generally with a costs penalty.³² In 2004, however, rule 1 of Order 27 was amended,³³ such that it now reads as follows:-

“If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may ... at the expiration of that time apply to the Court to dismiss the action, with costs, for want of prosecution; and on the hearing of the first such application, the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just; and on the hearing of any subsequent application, the Court *shall* order the action to be dismissed as aforesaid, unless the Court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure and, where it is so satisfied, the Court shall make an order—

(a) extending the time for delivery of a statement of claim,

(b) adjourning the motion for such period as is necessary to enable a statement of claim to be delivered within the extended time,

and on such adjourned hearing—

(i) if a statement of claim has been delivered within the extended time, the Court shall allow the defendant the costs of and in relation to the motion at such sum as it may measure in respect thereof;

(ii) if a statement of claim has not been delivered within the extended time, the Court shall order the action to be dismissed, with costs, for want of prosecution.

7.15 Thus, a plaintiff must now show special circumstances for failing to deliver a statement of claim within the specified time, and must justify his or her failure to adhere to the time-limit. Where the plaintiff fails to provide such a

³² Abrahamson *Developments in Delay - no more comfortable assumptions* (2006) 2(2) JCPPP 2.

³³ See *Rules of the Superior Courts (Order 27 (Amendment) Rules) 2004* (S.I. No. 63 of 2004).

justification, the court “shall” dismiss the plaintiff’s claim. Moreover, if time is extended and the plaintiff again fails to comply with the time-limit, the court “shall” dismiss the claim. In effect, this means that a plaintiff can no longer repeatedly ignore the obligation to prosecute his claim expeditiously; rather, he or she will have to advance an acceptable justification for any delay.³⁴

7.16 In *Morrissey v Analog Devices BV*,³⁵ Herbert J. noted that the amendment of Rule 27 in 2004 had “signalled a change of attitude to procedural delay.” Indeed, through this amendment, the Oireachtas has indicated its desire to create a culture of adherence to the time-limits that apply to the prosecution of civil actions, and its support for the principle that parties should prosecute their claims with due expedition and promptness.

(2) Increased awareness of the Consequences of Delay

7.17 In *Gilroy v Flynn*, Hardiman J. noted the following as the second recent development in the approach of the courts to want of prosecution:-

“[T]he Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.³⁶

7.18 Of particular relevance in this context is the previous decision of Hardiman J. in *J O’C v Director of Public Prosecutions*.³⁷ Although that case involved a delay in the prosecution of a criminal case, Hardiman J. addressed the general effect of lapse of time on a proposed trial in cases of all kinds, “civil as well as criminal and whether the trial is to be held with or without a jury”.³⁸ Hardiman J. noted that “lapse of time is intrinsically prejudicial to the fairness of a trial”, in relation to cases of all kinds.³⁹ Following a comprehensive examination of previous cases involving lengthy periods of delay, both Irish and in the UK, Hardiman J. drew the following principles:-

- (a) A lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: “the chances of

³⁴ Abrahamson *Developments in Delay - no more comfortable assumptions* (2006) 2(2) JCPP 2.

³⁵ *Morrissey v Analog Devices BV* [2007] IEHC 70.

³⁶ *Gilroy v Flynn* [2004] IESC 98.

³⁷ *J. O’C. v DPP* [2000] 3 IR 478.

³⁸ *Ibid* at 495.

³⁹ *Ibid* at 495.

- the courts being able to find out what really happened are progressively reduced as time goes on";
- (b) The lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity ... to be effectively heard";
 - (c) Such lapse of time may be so great as it would be "contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial which (he or) she would have to try to defeat an allegation of negligence on her part in an accident that would taken place 24 years before the trial ...";
 - (d) Having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it "whether culpable or not", because a long lapse of time will "necessarily" create "inequity or injustice", amount to "an absolute and obvious injustice" or even "a parody of justice";
 - (e) The foregoing principles apply with particular force in a case where "disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past ...", as opposed presumably cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.⁴⁰

(3) Impact of the ECHR

7.19 As seen in Chapter One above, the European Court of Human Rights has condemned excessive delays in domestic litigation. The Irish State has been found to be in breach of the Convention on a number of occasions with respect to its obligation to ensure that legal proceedings are brought to a final determination within a reasonable time. The importance and relevance of the Strasbourg Court's jurisprudence is a factor that the Commission considers cannot be underestimated in terms of the approach that should be fostered with respect to the creation of a modern limitations regime.

(4) Restrictions in Personal Injuries litigation

7.20 Also indicative of the Oireachtas' desire to foster a more stringent approach within the courts to the passage of time in civil proceedings is the *Civil Liability and Courts Act 2004*, which places restrictions on the courts' ability to enlarge the time limits available for the performance of procedural steps in personal injuries actions. Section 9(1) thereof provides:-

⁴⁰ *J. O'C. v DPP* [2000] 3 IR 478, 499-500.

“It shall be the function of the courts in personal injuries actions to ensure that parties to such actions comply with such rules of court as apply in relation to personal injuries actions so that the trial of personal injuries actions within a reasonable period of their having been commenced is secured”.

7.21 Although section 9 does not materially alter the courts’ jurisdiction to ensure compliance with time limits set out in the *Rules of the Superior Courts 1986*,⁴¹ it is a further indication on the part of the Oireachtas that time limits should be more rigorously enforced.⁴²

D A Stricter Approach to Delay

7.22 The remarks made by Hardiman J. in 2004 with respect to the role of the Courts in ensuring that Article 6 rights are not infringed⁴³ have been cited and applied in a series of recent cases decided by the Superior Courts. In *Stephens v Paul Flynn Ltd*,⁴⁴ Clarke J. adverted to the decision in *Gilroy*. He noted that the “central tests” (i.e. inordinate and inexcusable delay, and the balance of justice) remain the same, but he went on to state that in light of the conditions prevailing in the courts system, there was a need for a significant re-assessment of the weight to be attached to the various factors that are to be considered in respect of the balance of justice:-

“[I]t seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore.”

⁴¹ The courts have a general discretion to enlarge any time limit prescribed by the Rules; see e.g. Order 122, rules 7 and 8, RSC.

⁴² *Abrahamson Developments in Delay - no more comfortable assumptions* (2006) 2(2) JCPP 2.

⁴³ See *Gilroy v Flynn* [2009] 1 ILRM 290.

⁴⁴ *Stevens v Paul Flynn Ltd* [2005] IEHC 148.

7.23 Clarke J.'s judgment in *Stephens* was upheld in the Supreme Court, where Kearns J. referred to remarks made by Hardiman J. in *Gilroy v Flynn* as to the "changing legal landscape" and noted that "by no stretch of the imagination" could be period of delay that preceded the delivery of a statement of claim in that case be seen as anything other than inordinate.⁴⁵

7.24 In *Roche v Michelin Tyre plc*,⁴⁶ Clarke J. reiterated that despite recent developments in the law in this area, the basic questions which the court has to address remain those originally set out in *Rainsford v Limerick Corporation*.

7.25 This approach was approved in *Wolfe v Wolfe*⁴⁷ by Finlay Geoghegan J., as follows:-

"[T]he decisions since *Primor plc v. Stokes Kennedy Crowley* do not mean that there have been a change in the factors which the court should properly take into account in assessing where the balance of justice lies but rather that the weight to be attached to the various factors may need to be reconsidered."

7.26 A comparable approach was taken in a number of other recent cases.⁴⁸ Of particular relevance are the following comments of Clarke J. in *Kategrove (in receivership) v Anglo Irish Bank*:-

"It is clear, therefore, that in a case where the defendant applicant satisfies the court that there is inordinate and inexcusable delay, the court should go on to consider where the balance of justice lies by reference to the factors identified in *Primor* but with a stricter approach to compliance."⁴⁹

7.27 An alternative approach was adopted in *Morrissey v Analog Devices BV*.⁵⁰ In that case, Herbert J. noted that the amendment of Rule 27 in 2004 had "signalled a change of attitude to procedural delay." He went on to observe that this was a "material and significant change" have been "further indicated and strongly emphasised" by the Supreme Court in *Gilroy v Flynn*, again in 2004.

⁴⁵ *Stevens v Paul Flynn Ltd* [2008] IESC 4.

⁴⁶ [2005] IEHC 294.

⁴⁷ [2006] IEHC 106.

⁴⁸ See e.g. *Wicklow County Council v O'Reilly & Others* [2007] IEHC 71; *Halpin v Smith* [2007] IEHC 279; *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 297; *Flynn v AIB plc & Others* [2008] IEHC 199.

⁴⁹ [2006] IEHC 210.

⁵⁰ [2007] IEHC 70.

Herbert J. noted, however, that the delay that was at issue in *Morrissey* had occurred in October, 2004, and he held as follows:-

“[I]n my judgment it would be neither reasonable nor just for this court to immediately enforce such a significantly changed approach to procedural delay on the part of a claimant by reference to facts developing at the same time as this new jurisprudence was itself evolving.”

7.28 The decrease in the level of tolerance that will be shown by the courts to procedural delay was very evidence from the following comments of Feeney J. in *Faherty v Minister for Defence & Ors*:-

“The current approach of the Courts in supervising litigation cannot permit the continuance of proceedings such as these where delay is so excessive and so inordinate as to be a cause of a real risk to justice and where stale proceedings are allowed to fester and where no real excuse has been offered.”⁵¹

(1) Recent Reservations

7.29 In the Supreme Court decision of *Desmond v MGN Ltd*,⁵² Kearns J. held that in the light of the remarks of Hardiman J. in *Gilroy v Flynn* and Clarke J. in *Stevens v Paul Flynn Ltd*, the requirements of the European Convention on Human Rights “add a further consideration to the list of factors which were enumerated in *Primor* as factors to which the courts should have regard when deciding an issue of this nature.”

7.30 In his concurring decision in that case, however, Geoghegan J. took a certain degree of issue with the comments of Kearns J. as to the evolution of the courts’ approach to want of prosecution. Specifically, Geoghegan J. noted that on his analysis, the comments expressed by Hardiman J. in *Gilroy v Flynn* were *obiter dicta*. Geoghegan J. stated firmly that the basic principles set out in *Rainsford v Limerick Corporation* and *Primor plc v. Stokes Kennedy Crowley* “remain substantially unaltered.” He continued as follows:-

“I do not think that the case law of the Court of Human Rights relating to delay justifies reconsideration of those principles or in any way modifies those principles. I do not know of any relevant case of the Court of Human Rights dealing with when an action should be struck out for delay. The dicta of Hardiman J. to which I have already referred indicate that his view is that application of those principles should now change or indeed that the principles themselves might have to be

⁵¹ [2007] IEHC 371.

⁵² [2008] IESC 56.

“revisited”. I am not convinced that that would be either necessary or desirable. It would seem to me that those principles have served us well. Unless and until they are altered in an appropriate case by this court, I think that they should still be treated as representing good law [...].”⁵³

7.31 Also concurring with the dismissal of the claim for want of prosecution, Macken J. expressed a similar degree of reservation, as follows:

“Quite apart from the specific requirement of a plaintiff in a libel action to progress his claim with real diligence, there are also, as is recalled by the appellant, obligations to progress proceedings, which may be traced to the provisions of the European Convention on Human Rights and to certain jurisprudence of the European Court of Human Rights. While accepting that is undoubtedly so, I do not think it necessary for the resolution of this appeal to invoke that jurisprudence, there being ample extant Irish jurisprudence on the matter without doing so. The extent to which that jurisprudence of the European Court of Human Rights supports an automatic striking out of proceedings due to delay is not, in my view, yet established. Nor am I aware of any jurisprudence of that court which suggests that where inexcusable delay is found, the balancing exercise established in Irish jurisprudence is inappropriate. I am satisfied that the tests mentioned by Clarke. J. in *Stephens v Flynn Limited*, (unrept’d the High Court 28th April 2005) remain those applicable, namely:

1. Ascertain whether the delay in question is inordinate and inexcusable; and
2. If it is so established the court must decide where the balance of justice lies.”

7.32 Thus, it is clear that the evolution of the courts’ approach to want of prosecution is continuing and there remains a degree of ambiguity as to the degree to which the incorporation of the European Convention on Human Rights into domestic law will in fact, impact on the courts’ practices. The general principles set out in *Primor* and *Rainsford* still represent the watermark, albeit that the weight to be given to the various factors set out therein is, at present, in a state of flux.

(2) A stricter approach to delay in other areas of the law

7.33 Of further relevance in the context of a review of limitation law is the fact that the new approach of intolerance to delay emanating from *Gilroy v*

⁵³ *Desmond v MGN Ltd* [2008] IEHC 56.

Flynn have been applied by the courts outside of the context of want of prosecution. In *Crawford Inspector of Taxes v Centime Ltd*,⁵⁴ Clarke J. was assessing an appeal by way of case stated on a point of law with respect to a determination of the Appeals Commissioner that the respondent was a taxable person within the meaning of the *Value Added Tax Act 1972*. As a preliminary point, Clarke J. noted that there had been a delay of some 30 months between the date of the Appeal Commissioner's decision and the date of the case stated. He accepted that the process by which cases stated are agreed frequently leads to significant delays in the presentation of an agreed text, and that the 30 month delay in that case was not unusual, but he went on to remark as follows:-

“However it is important to note that the jurisprudence of the courts in this jurisdiction, relying at least in part on the jurisprudence of the European Court of Human Rights, has come, in recent times, to recognise the necessity for the supervision of matters before the courts in a manner designed to ensure the timely disposal of all litigation (see for example *Gilroy v. Flynn*, Unreported, Supreme Court, Hardiman J. 3rd December, 2004). Similar principles apply to quasi judicial tribunals such as the Appeal Commissioner which can have serious consequences for the rights of parties particularly where such tribunals are, in a sense, preliminary to the courts system. It seems to me that that it may well be necessary to give active consideration to the possibility of.”

7.34 Clarke J. suggested that it may be necessary to give active consideration to the possibility of introducing improved methods for arriving at the text of a case stated so as to avoid the sort of delays which had occurred in that case and which occur in many other cases, but he went on to clarify that his comments should be taken as referring to the general issue of the need to introduce a more efficient system for ensuring the timely forwarding of a case stated to this court rather than being seen as a comment on anything specific that arises on the facts of that case.⁵⁵

7.35 The case of *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd*⁵⁶ involved an application to set aside an order granted by McKechnie J. for the renewal of a summons for a period of three months. In his judgment in the High Court, O'Sullivan J. adverted to the principle addressed in *Gilroy v Flynn*. In a further case relating to the renewal of a

⁵⁴ *Crawford Inspector of Taxes v Centime Ltd* [2005] IEHC 328.

⁵⁵ *Crawford Inspector of Taxes v Centime Ltd* [2005] IEHC 328.

⁵⁶ [2006] IEHC 215.

summons, *O'Grady v The Southern Health Board & Anor*,⁵⁷ O'Neill J. noted that under the jurisprudence of the European Court of Human Rights, there is an obligation on the court to ensure that all proceedings are completed in a reasonable time-frame, and he adverted to *Gilroy* and to the *Allergan* decision as authority for the following proposition:-

“These cases require [...] a much stricter approach than hitherto applied to all questions where the indulgence of the court is sought, where the primary problem is default of pleading or other form of procedure or lapse of time.”⁵⁸

7.36 The Supreme Court has adopted a similar sense of urgency with respect to the prosecution of criminal proceedings.⁵⁹ In *McFarlane v The Director of Public Prosecutions*, Kearns J. stated:-

“[T]he Court must remember that degrees of dilatoriness which may have been acceptable in the past may no longer be tolerated since the European Convention on Human Rights Act, 2003 gave effect in this jurisdiction to the provisions of the Convention. This is a theme more fully adumbrated upon by Hardiman J. with regard to civil litigation in *Gilroy v Flynn* [2005] 1 ILRM 290 and more recently by this Court in the context of criminal litigation in *Noonan (aka Hoban) v D.P.P.* [2007] IESC 34. Both the Constitutional right under Article 38.1 and the rights derived under Article 6 of the Convention to a trial with reasonable expedition must be vindicated by being given real effect.”⁶⁰

7.37 Moreover, in a recent decision in the long-running case of *Moorview Development Ltd v First Active plc*,⁶¹ Clarke J. made some preliminary observations in respect of what he saw as an “unduly lax approach to compliance in a timely fashion with procedural requirements.” He continued as follows:-

“In the context of the jurisprudence concerning the dismissal of proceedings arising out of undue delay in their prosecution, Hardiman J., in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, spoke of the need to bring an end to what he described as an era of almost endless indulgence. Where parties come to expect almost endless indulgence then such parties are likely to act on the not unreasonable assumption that they

⁵⁷ [2007] IEHC 38.

⁵⁸ *Ibid.*

⁵⁹ See e.g. *Noonan (aka Hoban) v DPP* [2007] IESC 34.

⁶⁰ [2008] IESC 7.

⁶¹ [2008] IEHC 274.

will be indulged again to the considerable detriment of the proper functioning of the timely administration of justice and with consequent significant potential injustice across a whole range of cases. That consequence is a matter which needs to be given all due weight in any consideration.”

7.38 Thus, it is not simply in the context of motions to dismiss for want of prosecution that the recent developments noted in *Gilroy v Flynn* have led to a more strict approach on the part of the courts with respect to delay in the prosecution of a claim.

E Relationship with the *Statute of Limitations*

7.39 The courts’ approach to the dismissal of cases for want of prosecution differs with respect to delay that was incurred prior to the commencement of proceedings (pre-commencement delay) and delay that subsequently incurred in the prosecution of the claim (*post-commencement* delay). *Post-commencement delay* involves procedural delays in the conduct of proceedings, such as a failure to deliver pleadings for lengthy periods of time, following the issue of the originating document. *Pre-commencement delay* involves a delay between the occurrence of the events that gave rise to the proceedings, the accrual of the cause of action and the initiation of proceedings. Once proceedings are officially commenced, the *Statute of Limitations* ceases to run against the plaintiff. All delay after this date is *post-commencement* delay.

(1) Relevance of the Expiry of the Limitation Period

7.40 If proceedings are commenced within the limitation period and delay thereafter occurs in the prosecution of the case, account must be taken by the courts, when assessing whether or not to dismiss the claim for want of prosecution, of whether or not the statutory limitation period has expired. In general, statutes of limitations are designed so as to allow a plaintiff a particular length of time before he or she must commence proceedings, within which to consider the facts, investigate matters, seek legal advice, and seek to achieve a negotiated settlement. If the period that would be available to a plaintiff under the *Statute* has not yet elapsed at a time when the court dismisses the claim for want of prosecution, the dismissal is somewhat fruitless: the plaintiff can simply commence fresh proceedings; thus, the delay will necessarily be lengthened and the prejudice to the defendant aggravated and exacerbated. Of course, it would be open to a defendant to argue that the plaintiff was engaging in frivolous or vexatious litigation if they were to commence fresh proceedings, but the court analysing the motion for dismissal could not predict how that matter would be resolved.

7.41 For these reasons, it is generally considered that any delay in commencing proceedings within the time allowed by the *Statute of Limitations 1957* is “excusable” under the traditional two-step test.⁶²

(2) The House of Lords’ Approach

7.42 The House of Lords in *Birkett v James* addressed the above considerations,⁶³ and went on to rule that in the absence of conduct amounting to an abuse of process, the fact that the limitation period has not yet expired must always be “a matter of great weight” in an application to dismiss for want of prosecution.⁶⁴ Lord Salmon stressed that it is “only in the most rare and exceptional circumstances” that an action would be dismissed before the expiry of the limitation period.⁶⁵ Lord Diplock held that the defendant must show something “exceptional” to bring the case outside the general principle.⁶⁶

7.43 In *Tolley v Morris*, the House of Lords summarised the general rule as follows:

“[A]n action would not normally be dismissed for want of prosecution while the relevant period of limitation was running, because the plaintiff could, without abuse of the process of the court, issue a fresh writ within that period.”⁶⁷

7.44 In other words, as a general rule, delay prior to the expiry of the statutory limitation period, however inordinate, cannot of itself justify dismissal for want of prosecution. This does not mean, however, that such delay is discounted entirely by a court when assessing a motion to dismiss. To the contrary; where a plaintiff has delayed in commencing proceedings, it becomes essential for him to proceed expeditiously with the prosecution of the claim. This duty of expedition was expressed as follows by Lord Diplock in *Birkett v James*:-

“A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the

⁶² See e.g. *Southern Mineral Oil Ltd v Cooney* [1997] 3 IR 549.

⁶³ [1978] 1 AC 297.

⁶⁴ *Ibid* at 322.

⁶⁵ *Ibid* at 328.

⁶⁶ *Ibid* at 325.

⁶⁷ [1979] 1 WLR 592, 594 (Wilberforce LJ).

action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.”⁶⁸

(3) Ireland: The General Rule

7.45 The decision of the House of Lords in *Birkett v James* was adopted and applied by the Irish courts in *Hogan v Jones*.⁶⁹ That case involved four years’ delay prior to the commencement of proceedings, within the statutory limitation period. The parties agreed that this delay did not fall to be taken into account in calculating whether or not inordinate delay had occurred, but rather was material only to the subsequent conduct of the plaintiffs.⁷⁰

7.46 *Hogan v Jones* was cited in *Stevens v Paul Flynn Ltd* as authority for the following proposition:-

“[I]t is clear that inordinate and inexcusable delay in the commencement of proceedings is not, in itself, a factor though it may colour what happens later.”⁷¹

7.47 In *Stevens*, Clarke J. affirmed that “the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings”.⁷² *Hogan* was cited in *Rogers v Michelin Tyre Plc* as authority for the principle that “delay which is required to justify dismissal of an action for want of prosecution must relate to the time which the plaintiff allows to lapse unnecessarily after the proceedings have been commenced”.⁷³

7.48 Nevertheless, as is the case in the UK and as was neatly stated by Barron J. in *Southern Mineral Oil v Cooney*, “the fact that the proceedings were issued in time does not write off such delay as a factor in the event of further delay.”⁷⁴ In *Hogan v Jones*, Murphy J. adverted to the duty of expedition set out in *Birkett v James*.⁷⁵ This lead was followed in *Stevens v Paul Flynn Ltd*, where

⁶⁸ [1978] 1 AC 297, 322. This duty was first established in *Rowe v Tregaskes* [1968] 1 WLR 1475.

⁶⁹ [1994] 1 ILRM 512. See further Williams *A New Approach to Pre-Issue Delay in Civil Actions?* (2008) Bar Review.

⁷⁰ *Hogan v Jones* [1994] 1 ILRM 512, 516.

⁷¹ [2005] IEHC 148.

⁷² [2005] IEHC 148.

⁷³ [2005] IEHC 294.

⁷⁴ [1997] 3 IR 549, 571.

⁷⁵ [1994] 1 ILRM 512.

Clarke J. stated that there is a very heavy onus on a plaintiff to proceed with extra diligence in progressing the proceedings in circumstances where the proceedings were commenced just a few days before the expiry of the six year statutory limitation period. In the light of that fact, he considered a delay of 20 months in the filing of a statement of claim to be inordinate. He noted that he would have considered such a delay to be inordinate even on the basis of the “traditional jurisprudence” but that he would take such a view “with even greater strength” in the light of the Supreme Court’s remarks in *Gilroy*.⁷⁶

7.49 In *Wicklow County Council v O’Reilly & Anor*, Clarke J. summarised the general rule with respect to pre-commencement delay in the following concise fashion:-

“Firstly it is well settled that a case which is late is starting must be proceeded with great expedition. Secondly insofar as the overall balance of justice is concerned the court can have regard to the totality of the delay between the date of the events giving rise to the proceedings and any likely date of hearing.”⁷⁷

(4) Ireland: Exceptional Cases

7.50 The House of Lords in *Birkett v James* expressed the view that because Parliament has, through the relevant limitation legislation, manifested its intention that a plaintiff has a legal right to commence an action, the courts have no role in interfering with that legal right in the absence of an abuse of process.⁷⁸ The Lords have retained this position, stating that “[t]he courts must respect the limitation periods set by Parliament; if they are too long then it is for Parliament to reduce them.”⁷⁹

7.51 This principle does not apply in Ireland. The Irish courts have consistently stated that the fact that an action has been commenced within the period permitted by limitations legislation does not preclude a court from dismissing the action. In *Toal v Duignan (No. 2)*, the Chief Justice concluded that “to conclude otherwise is to give to the Oireachtas a supremacy over the courts which is inconsistent with the Constitution.”⁸⁰ He continued as follows:-

⁷⁶ [2005] IEHC 148.

⁷⁷ [2007] IEHC 71, § 7.9. See further the decision of Hamilton CJ in *Sheehan v Amond* [1982] IR 235.

⁷⁸ *Birkett v James* [1978] 1 AC 297, 322.

⁷⁹ *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 2 WLR 578, 585.

⁸⁰ [1991] ILRM 140, 142.

“If the courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept a legislative intervention in what is one of the most fundamental rights and obligations of a court to do ultimate justice between the parties before it.”⁸¹

7.52 Thus, the Irish courts will not simply defer to the Oireachtas as to the appropriate duration within which a plaintiff may defer commencing proceedings. The courts perform, in effect, a system of checks and balances with respect to the present or absence of prejudice to defendants and in a number of cases, the courts have dismissed a claim for want of prosecution based solely on delay in the commencement of proceedings, within the statutory limitation period. Motions to dismiss based on lengthy periods of pre-commencement delay were considered, for example, in *Toal v Duignan (No. 1)*⁸² and *(No. 2)* (23 years’ delay),⁸³ *Guerin v Guerin* (20 years’ delay),⁸⁴ *Kelly v O’Leary* (50 years’ delay),⁸⁵ and *J MacH v JM* (57 years’ delay).⁸⁶ In each of these cases, the running of the basic limitation period had been postponed owing to the minority of the plaintiff. The motions to dismiss were, therefore,

⁸¹ *Ibid* at 142-3. See also the judgment of McCarthy J. in *Donohue v Irish Press plc* [2007] IEHC 264, at § 15.

⁸² [1991] ILRM 135. The plaintiff suffered personal injuries at birth in 1961. He instituted proceedings in 1984.

⁸³ *Toal v Duignan (No. 2)* [1991] ILRM 140, 142.

⁸⁴ *Guerin v Guerin* [1992] 2 IR 287, 293. The plaintiff suffered personal injuries aged 4, in August 1964. He instituted proceedings in December 1984. The proceedings were “not prosecuted with any great dispatch”. Costello J focussed solely on the pre-issue delay, however, finding it to be inordinate but excusable.

⁸⁵ *Kelly v O’Leary* [2001] 2 IR 526. The plaintiff issued proceedings in 1998 in respect of personal injuries that allegedly occurred between 1934 and 1947.

⁸⁶ *J MacH v JM* [2004] 3 IR 385. It should be noted that *Ó Domhnaill v Merrick* [1984] IR 151 has been equated with the above cases, but the motion to dismiss in that case was, in fact, based on a mixture of pre- and post-commencement delay. The plaintiff sustained personal injuries in 1961, aged 3. Her claim was initiated 16 years later, in 1977. She then delayed further, and sought an extension to deliver a statement of claim in 1982.

based on delay during “limitation periods of extraordinary length”.⁸⁷ In *J MacH v JM*, Peart J. noted that a “wider discretion based on general fairness” applies to such cases.⁸⁸

7.53 In *Southern Mineral Oil Ltd v Cooney*,⁸⁹ Keane J. (as he then was) explained the rationale for the approach adopted by the Irish courts in this series of cases, noting that actions subject to lengthy limitation periods may not be initiated for a long period after the events giving rise to the cause of action, perhaps running into decades. Such periods of pre-commencement delay may be “so extreme that it would be unjust to call upon a particular defendant to defend himself”. In the event of such injustice, the courts must apply the constitutional guarantee of fair procedures, and assess the inordinacy of the delay.⁹⁰ Keane J. observed that different considerations apply to claims to which a standard limitation period (i.e. 6 years or less) apply, as much shorter periods of pre-commencement delay arise and the risk of prejudice to the defendant is much less. Keane J. reiterated that in such cases, pre-issue delay “may not, of itself, be sufficient to justify the striking out of the proceedings.”⁹¹

7.54 The *Statute of Limitations (Amendment) Act 2000* creates a new category of ‘disability’ that postpones the running of the limitation period. Section 3 of the Act provides a saver in relation to court’s power to dismiss on ground of delay in the following terms:

“Nothing in section 48A of the Statute of Limitations, 1957 (inserted by section 2 of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of there being such *delay between the accrual of the cause of action and the bringing of the action* as, in the interests of justice, would warrant its dismissal.”⁹²

7.55 It is clear from this provision that the Oireachtas envisaged that dismissal could be based on pre-commencement delay alone, in the context of a postponed limitation period. The House of Lords has, by contrast, refused to

⁸⁷ *Southern Mineral Oil Limited (in liquidation) v Coonev* [1997] 3 IR 549, 560.

⁸⁸ *J MacH v JM* [2004] 3 IR 385.

⁸⁹ *Southern Mineral Oil Ltd (in liquidation) v Cooney* [1997] 3 IR 549.

⁹⁰ *Ibid* at 562.

⁹¹ *Southern Mineral Oil Ltd (in liquidation) v Cooney* [1997] 3 IR 549, 562.

⁹² Section 3, *Statute of Limitations (Amendment) Act 2000*. Emphasis added.

recognise lengthy limitation periods as an exceptional circumstance justifying the dis-application of the general rule set out in *Birkett v James*.⁹³

7.56 In sum, therefore, unlike their UK counterparts, the Irish courts may dismiss claims based on lengthy delays prior to the commencement of proceedings, irrespective of the fact that the claim was not statute-barred and that the *Statute of Limitations* envisaged that a claim could be commenced during that period.

F Conclusion and Provisional Recommendation

7.57 The Commission considers that the courts' inherent discretion to dismiss for want of prosecution is an important tool through which the courts are enabled to perform their duties under Article 6 §1 of the European Convention on Human Rights to ensure that the determination of civil rights and obligations is achieved promptly and within a reasonable time.

7.58 The Commission considers that in the light of the above discussion, it is clear that the courts' inherent discretion to dismiss for want of prosecution is applied in accordance with judicially-developed guidelines, and that those guidelines lend a sufficient level of certainty to an area in which flexibility is essential to ensure the fulfilment of the aim of the courts' discretion, namely preventing claims being prosecuted in circumstances in which there is undue prejudice to the defendant.

7.59 Moreover, the Commission considers that the continuing availability of a discretion to dismiss even when the limitation period has not yet expired has the potential to enhance the operation of an ultimate limitation period as there would remain available to a defendant the option of seeking the dismissal of the claim where the passage of time has prejudiced his defence, even if the ultimate limitation period had not yet expired. In other words, the primary disadvantage of introducing an ultimate limitation is allayed by virtue of the courts' discretion to dismiss the claim in the event of prejudice; the courts would operate as a form of final safeguard against the unjust operation of a hard and fast ultimate limitation period.

7.60 *The Commission provisionally recommends that the proposed new legislation governing limitation of actions should include an express statement that, without prejudice to the provisions of the legislation, the courts may continue to exercise their inherent jurisdiction to dismiss a claim for prejudicial delay or want of prosecution.*

⁹³ See e.g. *Tolley v Morris* [1979] 1 WLR 592. The House of Lords refused to assess the inordinacy of the *pre-issue* delay even though the limitation period was very lengthy owing to the plaintiff's minority, and the defendant had been prejudiced by the delay. Lords Wilberforce and Dilhorne dissented.

CHAPTER 8 POSTPONEMENT, SUSPENSION AND EXTENSION OF LIMITATION PERIODS

A Introduction

8.01 This Chapter addresses what is variously described as the postponement, suspension, or extension of limitation periods. The discussion is framed by the firm (although, at present, provisional) view of the Commission that a simplified limitations regime should be introduced to replace the outdated and unduly complex system that applies in Ireland at present.

8.02 The conclusions drawn in this chapter are formulated against the background of the provisional recommendations made in the preceding chapters that a basic limitation period should run for a period of two years from the date of knowledge of the plaintiff and that a long-stop or ultimate limitation period of 12 years should run parallel to the basic limitation period, starting from the date of the act or omission giving rise to the cause of action. The central premise of this chapter is that the various facets of the proposed limitations regime – formulated so to as to balance the interests of the various parties – render it unnecessary and illogical to incorporate the current postponement rules.

8.03 Prior to the enactment of the *Statute of Limitations 1957* the provisions governing postponement were scattered in a number of different enactments. It appears that the postponement of limitation periods was first provided for in the English *Limitation Act 1623*.¹ The *Common Law Procedure Amendment Act (Ireland) 1853* also regulated postponement and the effect of acknowledgements and part-payments on actions on account of specialty, upon a judgment, statute or recognizance² and liabilities on simple contract.³

8.04 Part III of the *Statute of Limitations 1957* currently regulates postponement. It provides that even though the statutory limitation period has expired according to the general rules of limitation, the plaintiff may be entitled

¹ 21 Jac. 1, c. 16.

² Section 23, *Common Law Procedure Amendment Act (Ireland) 1853* (16 & 17 Vic, c.113).

³ *Ibid* at section 24.

to commence an action by proving that the cause of action has been kept alive by reason of any one of the following four factors: (a) the plaintiff's "disability"; (b) acknowledgement or part-payment by the defendant; (c) fraud or concealment by the defendant; or (d) the consequences of a mistake. The Commission discusses each of these factors in turn in this Chapter.

8.05 In Part B, the Commission addresses the situation that arises when the plaintiff is deemed incapable of managing his or her affairs or where the plaintiff is an infant on the date of accrual or the act or omission giving rise to the cause of action. In Part C, the continued application of the current rules governing acknowledgments and part-payments is questioned. Part D focuses on the merits of postponing the limitation period where the action is based on the fraud of the defendant or is concealed by fraud, while Part E centres on the extension of the limitation period where the plaintiff is seeking relief from the consequences of a mistake.

B The Plaintiff's 'Disability'

8.06 It has been the case since the early statutes of limitation that where a limitation period begins to run at a time when the plaintiff is deemed to be 'disabled' in some way, the running of the limitation period will be suspended until such time as the plaintiff ceases to be 'disabled'. This is because limitations law intends to operate only when a person is in a position to commence proceedings during the relevant period.

8.07 It is generally accepted that the limitation period will not (or at least should not) begin to run if the plaintiff is not in a position to make a reasonable judgment with respect to his affairs during the period allowed and commence proceedings if necessary. The plaintiff should be in a position to conduct investigations, to attempt to negotiate a settlement and to give instructions for the commencement of proceedings, if necessary. Those who are not able to make such decisions and carry out such tasks should be protected. The general principle in such cases has been such that the "date of accrual" test is side-stepped.

8.08 Under the *Limitation Act 1623*⁴ and the *Common Law Procedure (Ireland) Act 1853*,⁵ a plaintiff was allowed six years from the date on which he or she ceased to be under a 'disability' within which to commence an action. 'Disability' covered situations where the plaintiff was, at the date of accrual, under the age of 21, a married woman, a person "of unsound mind" or a person

⁴ Section 7, *Statute of James I 1623* (21 Jac. 1, c.16).

⁵ Section 20, *Common Law Procedure Amendment Act (Ireland) 1853* (16 & 17 Vic, c.113).

“beyond the seas”.⁶ There have been significant developments in the area of postponement since that time.

8.09 The disability of coverture (i.e. the position of a married woman under her husband's protection) was described in 1849 as “the simple consequence of that sole authority which the law has recognised in the husband, subject to judicial interference whenever he transgresses its proper limits.”⁷ The following view elucidates the thinking of that time:-

“In that variety of wills with which human nature is ordinarily constituted, it is absolutely necessary for the preservation of peace, that where two or more persons are destined to pass their lives together, one should be endued with such a pre-eminence as may prevent or terminate all contestation. And why is this pre-eminence exclusively vested in man? Simply, because he is the stronger. [...] Nor is this the only reason: it is always probable that man, by his education and manner of life, has acquired more experience, more aptitude for life, and a greater depth of judgment than the woman.”⁸

8.10 Coverture ceased to be a ‘disability’ for limitation purposes as a result of the *Married Women's Property Act 1882*.⁹ The absence of the plaintiff beyond the seas also ceased to be recognised as a disability as a result of the *Mercantile Law Amendment Act 1856*.¹⁰ Imprisonment was considered a ‘disability’ for limitation purposes until it, too, was abolished as such by the *Mercantile Law Amendment Act 1856*.¹¹ The *Forfeiture Act 1870*¹² provided that persons convicted of treason or felony and sentenced to death or penal servitude were ‘disabled’ for limitation purposes unless they were lawfully at

⁶ *Ibid* at section 22.

⁷ Peregrine Bingham *The Law of Infancy and Coverture* (Burlington: Chauncey Goodrich, 1849) at 180.

⁸ *Ibid* at 180-181. The jurist continued: “*They who, from some ill-defined notion of justice or generosity, would hold out to women an absolute equality, only hold out to them a dangerous snare.*”

⁹ 45 & 46 Vict, c. 75. That Act was repealed in full by the *Married Women's Status Act 1957* (No. 5 of 1957).

¹⁰ 19 & 20 Vic, c. 97.

¹¹ 19 & 20 Vic, c. 97.

¹² Section 8, *Forfeiture Act 1870* (33 & 34 Vic, c. 23). Section 8 was repealed in England and Wales by the *Criminal Justice Act 1948* (c. 58) and in Northern Ireland by the *Criminal Justice Act (Northern Ireland) Act 1953* (c. 14). It was repealed in Ireland by the *Criminal Justice Act 1997*.

large under licence or unless an administrator or curator of their property has been appointed.¹³

8.11 Sections 48 and 49 of the *Statute of Limitations 1957* replaced the disability provisions of the *Common Law Procedure (Ireland) Act 1853*.¹⁴ The *Statute* abolished the ‘disability’ of absence beyond the seas. It was considered that this provision was of little practical value, given that defendants can now be served with legal proceedings while outside of the jurisdiction. Absence “beyond the seas” had also given rise to difficulties of legal interpretation.¹⁵ The *Statute* repealed parts of section 19 of the *Moneylenders Act 1933*¹⁶ which specifically regulated absence beyond the seas.¹⁷

8.12 Under section 48 of the *Statute* the following persons are considered to be under a ‘disability’ for the purposes of limitation:¹⁸

- (1) Infants, that is, persons under 18 years of age;
- (2) “Persons of unsound mind”, which is in any event an inappropriate term that should now take account of proposals to reform the law on mental capacity; and
- (3) “Convicts,” an obsolete term used in the *Forfeiture Act 1870* (since repealed) to describe certain categories of prisoners.

8.13 Before discussing each of these three categories of persons in this Part, the Commission discusses the general approach of current limitations law to the issue of “disability.”

(1) “Disability”: the General Rule

8.14 As a preliminary point the Commission reiterates its previous recommendation that the term “disability” is no longer an appropriate term to use in a revised, modern limitations regime.¹⁹

¹³ Dáil Debates, volume 154, March 1 1956, *Statute of Limitations Bill, 1954 - Second Stage*, at 1147.

¹⁴ Sections 20 and 22 of the *Common Law Procedures (Ireland) Act 1853*, among other provisions, were repealed by the *Statute of Limitations 1957*.

¹⁵ Dáil Debates, volume 154, March 1 1956, *Statute of Limitations Bill, 1954 - Second Stage*, at 1147.

¹⁶ No. 36 of 1933.

¹⁷ See Part III of the Schedule to the *Statute of Limitations 1957*.

¹⁸ Section 48(1), *Statute of Limitations 1957*.

¹⁹ In 2001 the Commission recommended that the term be replaced with a wider concept incorporating “adult incapacity” and infancy. See Law Reform

8.15 *The Commission provisionally recommends that the term ‘disability’ should not form part of a revised, modern limitations regime.*

8.16 At present, the general rule is that where a plaintiff is under a legal “disability” on the date of accrual or the date of knowledge of the cause of action, the running of the limitation period will be postponed and will commence only when the plaintiff ceases to be under a disability or dies, whichever occurs first. The term ‘postponement’ is something of a misnomer because the effect is not that the running of the relevant limitation period is postponed; rather, for the great majority of actions, the plaintiff will have six years running from that date within which to commence his or her action.²⁰ For example, where the plaintiff is a child on the date of accrual, the limitation period is suspended until her 18th birthday and will run from that date for six years. She will therefore have until the day before her 24th birthday to commence proceeding. Where a person falls into a coma as a result of an accident, the running of the limitation period is suspended until the date on which he or she emerges from the coma and the limitation period will run for six years from that date.

8.17 The general six-year post-disability limitation period does not apply in a number of situations: a two-year post-disability limitation period applies in the case of personal injuries and wrongful death actions²¹ and actions brought under section 13(7) of the *Sale of Goods and Supply of Services Act 1980*.²² A three-year post-disability limitation period applies to actions seeking compensation for malicious injuries.²³ A three-year post-disability limitation period also applies to actions for damages for slander,²⁴ but an amendment to

Commission Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury) (LRC 64-2001) at paragraph 7.07.

²⁰ Section 49(1)(a), *Statute of Limitations 1957*.

²¹ Section 5(1), *Statute of Limitations (Amendment) Act 1991*, as amended by section 7(c), *Civil Liability and Courts Act 2004*. See sections 3(1), *Statute of Limitations (Amendment) Act 1991* and 48(1), *Civil Liability Act 1961* for a definition of what constitutes a personal injuries or wrongful death action.

²² See section 5(3), *Statute of Limitations Act 1991*. Section 13(8), *Sale of Goods and Supply of Services Act 1980* inserted a new section 49(5) into the *Statute of Limitations 1957*, setting a two-year limitation period for such actions. Since the reduction of the limitation period to two years introduced under section 7(c), *Civil Liability and Courts Act 2004*, section 5(3) of the 1991 Act is obsolete.

²³ Section 23(3), *Malicious Injuries Act 1981*.

²⁴ Section 49(3), *Statute of Limitations 1957*.

this rule is currently being debated in the Houses of the Oireachtas. A two-year post-disability limitation period applies to actions to recover a penalty or forfeiture or a sum by way of penalty or forfeiture, recoverable by virtue of any enactment.²⁵ These shorter post-disability limitation periods are, in effect, exceptions to an exception. They have developed in a piecemeal fashion and without cohesion or consistency. It is the view of the Commission that they serve only to create confusion in the already complex area of limitation, which should be clear and comprehensible insofar as that is possible.

8.18 A further exception applies with respect to actions against the estate of a deceased person. Until the *Civil Liability 1961* came into force, infants could wait until the expiry of the relevant limitation period, running from the age of majority, to commence a claim against the estate of a deceased person. The repercussions were set out by the Supreme Court in *Moynihan v Greensmyth*.²⁶

“This could mean that the administration of an estate might be greatly delayed or, alternatively, that after many years those entitled on a death might be subjected to a claim for damages of which there had been no prior notice. Obviously in such circumstances severe hardship might be caused and injustice done to innocent people.”

8.19 Section 9 of the *Civil Liability Act 1961* was enacted with a view to remedying any potential injustice. It provides that actions against the estate of a deceased person are subject to a fixed limitation period of two years, running from the date of death. This period cannot be extended in the event of disability. The constitutionality of this strict limitation period was upheld by the Supreme Court in *Moynihan v Greensmyth*²⁷, which bore in mind “the State's duty to others—in particular those who represent the estate of the deceased, and beneficiaries”.²⁸

8.20 There is one further exception - certain land-related actions are currently subject to an ultimate limitation period of 30 years' duration running from the date of accrual. These actions cannot be commenced after that thirty year period expires, even if the plaintiff remains under a “disability”.²⁹

²⁵ Section 49(1)(e), *Statute of Limitations 1957*.

²⁶ [1977] IR 55, 72 (SC).

²⁷ [1977] IR 55 (SC).

²⁸ [1977] IR 55, 72 (SC).

²⁹ See section 49(1)(d), *Statute of Limitations 1957* - the relevant actions are (i) Actions to recover land or money charged on land; (ii) Actions by an incumbrancer claiming sale of land and (iii) Actions in respect of a right in the nature of a lien for money's worth in or over land for a limited period not

8.21 There are also a number of restrictions on the application of the disability provisions of the *Statute*. The running of the limitation period is not postponed where the right of action accrues to a person (not under a disability) through whom the person under a disability claims.³⁰ Additionally, where a right of action which has accrued to a 'disabled' person accrues on the death of that person to another 'disabled' person, no postponement occurs by reason of the disability of the second person.³¹

(2) *A new limitations regime – is there a continued need for postponement where the plaintiff is incapable of managing his affairs?*

8.22 The Commission's proposed new limitations regime would incorporate a basic limitation period of two years running from the plaintiff's date of knowledge and an ultimate limitation period of twelve years running from the date of the act or omission giving rise to the cause of action. The provisional recommendations made in the preceding chapters are formulated so as to ensure maximum fairness to the plaintiff and the defendant as well as to society as a whole. In this context the Commission questions the need to make provision for the postponement of either the basic or the ultimate limitation period.

8.23 The Commission therefore turns now to discuss the merits of retaining postponement provisions in a new limitations regime, in the specific context of the plaintiff's inability to manage his or her own affairs whether by way of infancy or otherwise.

(a) *Persons who are incapable of managing their affairs*

8.24 Section 48(1)(b) and section 49 of the *Statute of Limitations 1957* make allowances for plaintiffs who are incapable of managing their own affairs by providing for the 'extension' of the limitation period where the plaintiff is "of unsound mind". Section 48(2) of the *Statute* is singularly unhelpful as to who is afforded protection under these rules, providing only the following antiquated example, without prejudice to the generality of the phrase:

exceeding life, such as a right of support or a right of residence, not being an exclusive right of residence in or on a specified part of the land.

³⁰ Section 49(1)(b), *Statute of Limitations 1957*.

³¹ Section 49(1)(c), *Statute of Limitations 1957*.

“a person shall be conclusively presumed to be of unsound mind while he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics.”³²

8.25 Section 48(1) (b) has been given a particularly narrow construction and is now understood to encompass only such persons who are, by reason of mental illness, not capable of managing their own affairs.³³ It has been suggested that such matters as capacity to instruct a solicitor properly or to exercise reasonable judgment on a possible settlement may indicate whether or not a person is of unsound mind.³⁴

8.26 The Commission has previously³⁵ expressed its dissatisfaction with the concept of ‘unsoundness of mind’ and again stresses that, like the concept of ‘disability’, this antiquated concept is entirely inappropriate today. In addition, the concept is problematic because it excludes from its protection certain categories of person who are no less deserving of protection than those who fall within its remit. For example, persons who are unconscious or in a coma, or those who suffer from very severe physical incapacity, may fall outside of the protection of section 48(1) (b).³⁶ The Commission has previously recommended the widening of the concept to persons who are incapable of the management of their affairs “because of disease or impairment of physical or mental condition”.³⁷

³² Section 48(2), *Statute of Limitations 1957*. This is expressed to be without prejudice to the generality of the phrase.

³³ See the judgment of Lord Denning MR in *Kirby v Leather* [1965] 2 QB 367; applied in Ireland by Kelly J. in *F.D. (An Infant) v Registrar of Wards of Court* [2004] 3 IR 95. See also the judgment of Barron J. in *Rohan v Bord na Móna* [1990] 2 IR 425.

³⁴ Brady & Kerr *The Law of Limitations* (2nd ed 1994) at 31.

³⁵ See generally Law Reform Commission *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) and *Report on Vulnerable Adults and the Law* (LRC 83-2006).

³⁶ Law Reform Commission *Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.08. Further difficulties arise with supervening disabilities; see Brady & Kerr *The Law of Limitations* (2nd ed., Law Society: Dublin, 1994) at 33 and *Rohan v Bord na Móna* [1990] 2 IR 425, 429-430.

³⁷ Law Reform Commission *Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraphs 7.08-7.13. It was recommended that “adult incapacity”

8.27 The Commission's previous recommendations were made in the context of a review of the current limitations regime. In the context of a proposed new regime, however, the Commission now faces the broader question of whether there is any continued justification for rules allowing for postponement of the limitation period where a person is incapable of managing his or her affairs.

8.28 The Commission is concerned that the effect of the current postponement rules is that where the plaintiff is incapacitated, the defendant is open to claims for an indefinite period of time. The problem is particularly acute where, for example, the plaintiff suffers from an incurable or open-ended illness. In such cases there is no natural term to the plaintiff's incapacity and no necessary end to the postponement of the limitation period.³⁸ Difficulties created by such an indefinite postponement include a heightened risk that the evidence will have deteriorated with the consequent danger of an unfair trial, and increased insurance costs with extra costs passed on to the consumer.³⁹

8.29 The potential for injustice in such cases is illustrated by the scenario in which a car crash caused by the negligence of the potential defendant causes an adult to suffer a form of intellectual impairment which has the potential to be cured but only after sustained medical treatment. In such a case, the potential defendant is left waiting and wondering when, if ever, the injured party will regain the capacity to commence proceedings. As was succinctly noted by the British Columbia Law Institute in 2002:

"Suspension provisions that are not subject to a cap significantly weaken the limitations system as defendants would never know if and when claims might be brought in favour of a person under a disability. This creates a great deal of uncertainty for defendants."⁴⁰

would apply "*where a person is incapable of the management of his affairs because of disease or impairment of physical or mental condition.*"

³⁸ By way of example see *Headford v Bristol and District Health Authority* [1995] PIQR P180: proceedings were started on behalf of the plaintiff (who had suffered brain damage at birth) twenty-eight years after the birth, despite the fact that the parents, who brought the proceedings, were aware that there were grounds for a claim within a few months of the birth.

³⁹ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.21.

⁴⁰ British Columbia Law Institute *Report on the Ultimate Limitation Period: Updating the Limitations Act* (Report No. 19, 2002) at 25.

8.30 The potential injustice implied by such a situation is mitigated to a degree by the possibility that an action commenced after such a long delay could be dismissed for want of prosecution even though it was not statute-barred, if the defendant is prejudiced by the delay. The courts' inherent power to dismiss in the event of an inordinate and inexcusable delay is a discretionary jurisdiction, however, and does little for legal certainty, less still for the defendant during the long years waiting and wondering if proceedings will issue.

8.31 Bearing these difficulties in mind, the Commission has looked carefully at the consequences of the proposed introduction of a general discoverability / date of knowledge test governing the running of the basic limitation period and is satisfied that such a test would render nugatory any provision allowing for the postponement of the basic limitation period in the event of a person's inability to manage his or her own affairs as the plaintiff's state of mind and capacity to bring proceedings impact upon the date of knowledge.

8.32 This does not remedy the possibility of open-ended liability for defendants, however. In the circumstances the Commission has given consideration to the question of whether or not the ultimate limitation period should run unaffected by the plaintiff's inability to manage his or her affairs.

8.33 The Commission is keen to ensure that there are as few exceptions as possible to the proposed ultimate limitation period which is formulated so as to ensure maximum certainty and fairness to defendants and to be easily understood and applied. The Commission is of the view that the incapacity of the plaintiff should not be allowed to postpone the running of the ultimate limitation period indefinitely. Fairness to plaintiffs must, of course, not be sacrificed to that end but the Commission is satisfied that sufficient protection will be available to plaintiffs provided that recent developments in the areas of guardianship and capacity, outlined below, are brought to fruition. These developments envisage a co-ordinated system whereby persons who are incapable of managing their own affairs would be protected by a guardian. Indeed, in that respect, the Commission notes that there are good reasons for supporting the approach that plaintiffs may benefit from bringing proceedings as early as possible, subject to suitable safeguards.

(i) *Developments in the law on Mental Capacity and Guardianship*

8.34 Significant developments have recently occurred in the law of mental capacity and guardianship, arising from the Commission's *Report on Vulnerable Adults and the Law* (2006).⁴¹ The Commission made extensive

⁴¹ Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006).

recommendations on determining when a person has the legal capacity to make a wide range of decisions. The Commission recommended that there should be a clear presumption that all persons who have reached the age of majority, 18 years of age, have capacity.⁴² The Commission recommended the introduction of a broad statutory definition of capacity focusing on functional cognitive ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made.⁴³

8.35 In 2008 the Government published the *Scheme of a Mental Capacity Bill 2008*, which is in line with the Commission's recommendations on capacity.⁴⁴ The Government has indicated that a *Mental Capacity Bill*, based on the 2008 Scheme, will be published in late 2009.⁴⁵

8.36 Significant developments have also been seen in the area of the law concerning the general legislative framework to assist those whose mental capacity is reducing or who have lost mental capacity. In the 2006 *Report on Vulnerable Adults and the Law*, the Commission recommended that a new legislative framework, to be called guardianship, should be established. At present, adults may be made wards of court in certain circumstances⁴⁶ but this is a completely outmoded system, regulated by the *Lunacy Regulation (Ireland) Act 1871*,⁴⁷ in which decision-making is completely removed from an individual in an "all-or-nothing" approach. The wards of court system does not, for example, take account of situations where assisted decision-making would be more appropriate for a person whose capacity is gradually diminishing over time rather than completely absent through acquired brain injury. In addition, the 1871 Act is also based on 19th century concepts of paternalism rather than contemporary views of capacity. On that basis, In its 2006 *Report on Vulnerable*

⁴² *Ibid* at paragraph 2.39.

⁴³ Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 1.73.

⁴⁴ The *Scheme of the Mental Capacity Bill 2008* is available at www.justice.ie

⁴⁵ Government Legislation Programme, April 2009, available at www.taoiseach.ie

⁴⁶ A person can be taken into wardship only if the President of the High Court is satisfied on the basis of medical evidence that the person should be deemed to be of unsound mind and is incapable of managing his affairs. See further *Lunacy Regulation (Ireland) Act 1871* (34 & 35 Vic, c. 22) and section 9, *Courts (Supplemental Provisions) Act 1961*.

⁴⁷ 34 & 35 Vic, c.22.

Adults and the Law,⁴⁸ the Commission proposed the introduction of a procedure by which a personal guardian could be appointed to assist in managing the affairs of an adult whose capacity is limited or who has lost some or all mental capacity, and where the role of the personal guardian would be tailored to the specific situation and condition of the individual involved.

8.37 The 2006 Report envisaged that a Personal Guardian would either assist in, or as appropriate actually make, decisions concerning the property, financial affairs and personal welfare of a person. The appointment would be made by way of a guardianship order and the Commission observed that the guardianship order could involve the personal guardian in a wide range of matters, including "the conduct of legal proceedings in the adult's name."⁴⁹

8.38 The Commission also recommended the establishment of an Office of the Public Guardian (OPG) which would oversee and supervise personal guardians. The proposed OPG would also play a wide-ranging advice, support and educational role for vulnerable people and their families.

8.39 The Government's *draft Scheme of a Mental Capacity Bill 2008*, discussed above, proposes to implement these recommendations. The Scheme proposes to replace the *Lunacy Regulation (Ireland) Act 1871* (subject to necessary transitional arrangements) and to provide for the appointment of personal guardians. Under the Scheme of the Bill, personal guardians could be authorised to take proceedings on behalf of the person in respect of whom they act as guardian. The Scheme also proposes to establish an Office of the Public Guardian to supervise personal guardians. The OPG would also be empowered to act as a personal guardian of last resort in the event that there is no person willing or able to act as a personal guardian.⁵⁰

8.40 The Commission is of the view that the proposed guardianship system has the potential to afford a suitable level of protection if the current rules governing postponement in the event of adult incapacity were not incorporated into a new limitations regime.

⁴⁸ Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006). That report brought together the issues canvassed in two consultation papers, the first on *Law and the Elderly* (LRC CP 23 - 2003) and the second on *Vulnerable Adults and the Law: Capacity* (LRC CP 37 - 2005).

⁴⁹ Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83-2006) at paragraph 6.58.

⁵⁰ See also the power of a person, at a time when the person retains full capacity, to appoint an attorney under the *Powers of Attorney Act 1996*. This could include power to conduct litigation on the person's behalf, which would come into force only where the appointing person loses capacity.

(ii) Developments in other jurisdictions

8.41 The Law Commission for England and Wales has proposed that, in general, the absence of adult capacity should not affect the running of the ultimate limitation period. The Law Commission was of the view that in most cases a person without capacity over more than a short period of time will be in the care of an adult who is able to act on his or her behalf.

8.42 The Law Commission's recommendations must be viewed in the context of the parallel recommendation that the ultimate limitation period should not apply at all in personal injuries cases.⁵¹ It made a special recommendation in respect of an incapacitated plaintiff who has suffered personal injury and is in the care of a responsible adult *ten years* after the onset of the disability and the date of the act or omission giving rise to the claim. In such a scenario, the primary limitation period be deemed to run from the date of knowledge of the adult in whose care the incapacitated plaintiff remains. This does not apply however, where the responsible adult is a defendant to the claim. The Law Commission recommended that the "representative adult" be the member of the plaintiff's family who is responsible for his or her day-to-day care or another person authorised to conduct proceedings in the name of the claimant.

8.43 The Scottish Law Commission has also made recommendations as to the running of the limitation period in the event of adult incapacity.⁵² It noted that because a guardian appointed under the *Adults with Incapacity (Scotland) Act 2000*⁵³ is subject to a measure of supervision by the Public Guardian, it might be thought that the guardian would act promptly in bringing the claim for damages and that a specific provision starting the running of time would no longer be necessary. The Scottish Commission recorded that its advisory group reported that past experience indicated that if the equivalent of a personal guardian was appointed to a person who lacked mental capacity, proceedings were normally instituted.⁵⁴ The Scottish Commission noted that the opinions of those consulted were divided on the guardianship issue, with some expressing concern about the risk of a guardian missing the limitation period. It noted that guardians may be appointed in a wide range of situations and some may have no knowledge of a claim and may be reliant on the ability of the *incapax* to communicate which might lead to injustice. The Commission acknowledged

⁵¹ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.127.

⁵² Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at 31.

⁵³ ASP 4.

⁵⁴ *Ibid* at 31.

that there were significant arguments on both sides but on balance concluded that the appointment of a guardian should *not* lift the suspension of the limitation period. In reaching that conclusion it stated that

“It was not suggested to us that the present law in this area operates in an unsatisfactory manner; that of itself tends to suggest that change is unnecessary.”⁵⁵

8.44 The British Columbia Law Institute (BCLI) made proposals in 2002 for the postponement of the ultimate limitation period in the event of adult disability.⁵⁶ The BCLI recommended that the proposed 10-year ultimate limitation period of general application should apply irrespective of the plaintiff’s disability.⁵⁷ It noted that protection is available to the adult who is under a legal disability who has a representative appointed under a power of attorney or a representation agreement. The representative will, it observed, typically be responsible for managing the affairs of the incapacitated adult, including bringing a law suit on his or her behalf if necessary. The BCLI noted that under the existing legislation, the running of time would be subject to the requirement that the defendant deliver a “notice to proceed” to the disabled person’s guardian and to the Public Guardian and Trustee. It will be noted that the Commission reached the view in 2001 that “notice to proceed” provisions do not really solve any problems because the onus is on the defendant to trigger the limitation period and a defendant is unlikely to want to do that as it may encourage a plaintiff or his guardians to take an action against him or her.⁵⁸

8.45 The Commission provisionally recommends that, in light of the proposal in the Government’s Scheme of a Mental Capacity Bill 2008 to establish a new guardianship system for adults whose mental capacity is limited or who lack mental capacity, the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is an adult whose mental capacity is limited or who lacks mental capacity.

⁵⁵ Scottish Law Commission *Report on Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com No. 207, December 2007) at 33.

⁵⁶ British Columbia Law Institute *Report on the Ultimate Limitation Period: Updating the Limitations Act* (Report No. 19, 2002) at 24.

⁵⁷ *Ibid* at 26.

⁵⁸ Law Reform Commission *Report on The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.36.

(b) Persons who are under 18 years of age

8.46 The *Common Law Procedure (Ireland) Act 1853* provided that if the plaintiff was under 21 years of age at the time of the accrual of a right of action, he or she could bring the action within six years after reaching the age of 21.⁵⁹ The motivation behind this principle was expressed in 1849 as being to prevent as far as possible “*the evils which would arise from the imbecility and inexperience to which every man is subject on his entrance into the world*”.⁶⁰ A more modern view is that the postponement of the limitation period until the age of majority prevents disputes between the parties as to the age at which the minor could properly ‘know’ the relevant facts and make informed and reasonable decisions with respect to his or her person and property.⁶¹

8.47 The 1853 Act applied in Ireland until the *Statute of Limitations 1957* came into force. As enacted, the *Statute* provided that an action could be brought at any time before the expiration of the relevant limitation period, running from the date on which the plaintiff reached the age of 21 years.⁶² This was reduced to 18 years of age under the *Age of Majority Act 1985*.⁶³ The general rule now is that where the plaintiff is under the age of 18 years on the date of accrual or the date of knowledge, the running of the limitation period is postponed and will run for six years from the plaintiff’s 18th birthday. This means that in the great majority of cases a plaintiff has until his or her 24th birthday to commence proceedings.

8.48 The Commission is concerned that the postponement provisions currently protecting infant plaintiffs have the potential to engender injustice and create a substantial risk of an unfair trial. That risk is illustrated by the following example: a little girl (the plaintiff) suffers personal injuries by tripping in a supermarket on her first birthday. Under the current rules, a two year limitation period will apply but it will not begin to run until the plaintiff’s eighteenth

⁵⁹ Section 22, *Common Law Procedure Amendment Act (Ireland) 1853* (16 & 17 Vic, c.113).

⁶⁰ Peregrine Bingham, *The Law of Infancy and Coverture* (Burlington: Chauncey Goodrich, 1849) at 1.

⁶¹ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.115.

⁶² Section 49(2)(a)(i), *Statute of Limitations 1957*, as enacted.

⁶³ See section 2(1)(a), *Age of Majority Act 1985* (No. 2 of 1985): a person attains full age if he has attained the age of eighteen years or is or has been married. See further section 31(1)(a), *Family Law Act 1995*: any marriage solemnised between people either of whom is under the age of 18 years is not a valid marriage.

birthday. The plaintiff will therefore have until the day before her 20th birthday to commence proceedings against the party whose negligence led to her injuries. Thus, the *Statute* would allow her some nineteen years before she is statute-barred. It is trite to suggest that with such a lapse of time there must be serious questions as to whether a defendant can be ensured a fair opportunity to present an effective defence. It is little consolation to the defendant that the potential for injustice is less acute than if the limitation period were to be postponed by the plaintiff's incapacity - this is because minority has a natural end and a set duration and, provided that he or she knows the child's date of birth, the defendant will know with certainty when the child will be deemed to have capacity and when the ultimate limitation period will begin to run against him or her.

8.49 The Commission is mindful that its recommendations must achieve a delicate balance between ensuring fairness to the defendant and allowing sufficient protection for the plaintiff. Bearing this in mind, the Commission recommended in 2001 that the running of the limitation period should not be postponed unless the infant plaintiff can show that at the time of the incapacity, he was not in the custody of a parent or guardian.⁶⁴ This recommendation was made with a view to ensuring the maximum fairness to the defendant and to minimising delays.

8.50 The Commission remains of the view that an infant plaintiff who is in the custody of a competent parent or guardian does not require the level of protection currently afforded to him by the *Statute*. The experience of the Commission is that in the great majority of cases, an infant plaintiff will have a parent or guardian who is capable of acting as the child's next friend and that in most cases, the parent or guardian will commence proceedings promptly on behalf of the child.⁶⁵ The Commission does not consider it unjustified to assume that the interests of minors are for the most part looked after by their parents or guardians. In the light of that experience the Commission considers that as they stand, the disability provisions over-protect the infant plaintiff, potentially at the expense of the defendant, even when the infant plaintiff has an adult representative who is fully aware of the relevant facts.⁶⁶

⁶⁴ Law Reform Commission *Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.32.

⁶⁵ See section 6, *Guardianship of Infants Act 1964*.

⁶⁶ See e.g. Prof. Michael Jones *Limitation Periods and Plaintiffs under a Disability - a Zealous Protection?* (1995) 14 C.J.Q. 258.

8.51 The Commission is of the view that to reduce the protection afforded to infant plaintiffs who are in the custody or care of a competent parent or guardian would be a proportionate measure towards safeguarding the defendant's rights. In addition it would have the corollary effect of reducing the need to invoke the inherent jurisdiction of the courts to dismiss for want of prosecution during the running of the limitation period and the lack of certainty that is intrinsic to the exercise of that jurisdiction.

8.52 *The Commission provisionally recommends that the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is a under the age of 18 and is in the custody of a competent parent or guardian who is conscious of his or her responsibilities and is capable of commencing proceedings on behalf of the plaintiff.*

(i) The potential for injustice in some cases

8.53 The Commission acknowledges that there are a number of scenarios in which there is potential for an injustice to be caused to an infant plaintiff if a new limitations regime does not afford the same protection as the current postponement provisions.

8.54 One of the key difficulties is illustrated by the decision of the Supreme Court in *O'Brien v Keogh*⁶⁷, which held that an analogous provision dealing with a person under the age of 18 (section 49(2)(a)(ii) of the *Statute of Limitations 1957*, as enacted) was unconstitutional.⁶⁸ Under that provision, infant plaintiffs who were in the custody of their parents at the date of accrual of certain causes of action were subject to the limitation period appropriate to an adult while infants who were not in the custody of their parents at that time had until their infancy ceased and the appropriate adult limitation period thereafter. In *O'Brien v Keogh* the infant plaintiff (suing through his mother) sought to bring proceedings against his father but was statute-barred because he was in the custody of his mother on the date of accrual. Giving the judgment of the Supreme Court, Ó Dálaigh CJ held that although the *Statute* did not contravene the guarantee of equality contained in section 40.1 of the Constitution, it failed

⁶⁷ [1972] IR 144.

⁶⁸ As enacted, section 49(2)(a)(ii) of the *Statute* provided that the postponement of the limitation period owing to infancy would only apply to certain personal injuries actions where the plaintiff proved that he or she was not in the custody of a "parent" at the time of the accrual of the cause of action. "Parent" was defined so as to include the infant plaintiff's father, mother, grandfather, grandmother, stepfather or stepmother, notwithstanding that the relationship is illegitimate or in consequence of adoption under the *Adoption Act 1952*.

to respect, defend, protect and vindicate the right to sue for personal injuries, which is one of the personal rights of a citizen protected by Article 40.3.⁶⁹ The Supreme Court had particular difficulty with the fact that the test was whether the infant plaintiff was in the custody of his parents *at the date of accrual*. This meant that if a family was in a car accident, resulting in the death of both parents, the limitation period would run as normal against the children as they were in their parents' custody at the time of accrual, even though they might be in a public-welfare institution. Ó Dálaigh CJ also noted the scenario of a child who wishes to take an action against one of his parents (e.g. for personal injuries sustained as a result of negligent driving). In such cases, the child would have been in the custody of his or her parent at the date of accrual of the cause of action and the limitation period would run as normal against the child, irrespective of the child's age or current family circumstances. The Supreme Court noted that both of these scenarios are "of too frequent occurrence."⁷⁰

8.55 Following *O'Brien v Keogh*, the custody provision ceased to be part of the law of limitations and the postponement provisions were restored without qualification to all infants.⁷¹ The custody provision was repealed in its entirety by the *Statute of Limitations (Amendment) Act 1991*.⁷² A similar custody provision in the English *Limitation Act 1939* was also removed after it was found to have a number of defects. Like the Supreme Court in Ireland, in 1974 the English Law Reform Committee questioned that the basic assumption underlying the rule, namely that where the minor is in the charge of a competent

⁶⁹ [1972] IR 144, 156-157.

⁷⁰ [1972] IR 144, 157.

⁷¹ *Ó Domhnaill v Merrick* [1984] 1 IR 151, 160-161. It is noteworthy that in *Moynihan v Greensmith* [1977] IR 55 the Chief Justice indicated that the decision in *O'Brien v Keogh* [1972] IR 144 seemed to be incompatible with *Foley v The Irish Land Commission* [1952] IR and *A.G. v Southern Industrial Trust Ltd* 118 [1957] 94 ILTR 161. The Supreme Court reserved the question whether it was correctly decided that section 49(2)(a)(ii) of the *Statute* is repugnant to the Constitution. In *Campbell v Ward and McArdle* (Carroll J) 28th April 1981, however, the High Court found that the words of the Chief Justice in *Moynihan v Greensmith* did not give her liberty to hear arguments as to whether *O'Brien v Keogh* was correctly decided. She considered herself to be bound by the latter decision "until such time as the Supreme Court reviews its decision." No such review took place.

⁷² Section 5(4), *Statute of Limitations (Amendment) Act 1991*. Section 22(d) of the English *Limitation Act 1939* (inserted by section 2(2) of the *Law Reform (Limitation of Actions etc) Act 1954*) was analogous to the Irish section 49(2)(a)(ii). Section 22(d) was removed by the English *Limitation Act 1975*. See *Tolley v Morris* [1979] 1 WLR 592.

adult, that adult can be trusted to seek legal advice and, if appropriate, to institute legal proceedings on his behalf. The Committee recommended the repeal of the provision, and this was done by section 2 of the English *Limitation Act 1975*.⁷³

8.56 Further difficulties arise in the case of an infant plaintiff as a by-product of the provisional recommendation of a 12-year ultimate limitation period running from the date of the act or omission giving rise to the cause of action. If, for example, a child suffered personal injuries at birth and the ultimate limitation period was to run unaffected by the child's minority, the child's action could be statute-barred by her twelfth birthday even if during that time she was not in the custody of a parent or guardian capable of commencing proceedings on her behalf. This is a clear example of the infant plaintiff being under-protected. The opposing arguments in this regard have been paraphrased as follows by the Law Commission for England and Wales:-

"It could be said that it is unduly harsh for the minor to lose his or her cause of action before he or she is regarded as having the capacity fully to understand it, and to bring proceedings on his or her own behalf. The opposing argument is that there is an interest in preventing claims in respect of stale claim, regardless of the identity of the claimant."⁷⁴

8.57 The Commission also acknowledges that while it is reasonable to assume that the parent or guardian of an infant will act in his or her best interests, this is not always borne out in reality. The parent or guardian may fail to act in the child's best interest for many reasons, whether as a result of financial difficulties, a conflict of interests, apathy or ignorance. If, for example, the potential defendant was the guardian or the parent or a close family member or friend, the parent or guardian might not be able or willing to take the case in the child's name. The Commission is concerned that, provided that the defendant is not prejudiced by the lapse of time, a child should not be forced to forfeit his or her legal rights as a result of the unwillingness or inability of the parent or guardian to pursue those rights on the child's behalf.

⁷³ Law Reform Committee *Twentieth Report (Interim Report on Limitation of Actions in Personal Injuries Claims)* (1974, Cmnd 5630) at paragraph 108. See Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.117, where the re-introduction of a custody clause was considered. The Law Commission recommended no change to the law as it stands, worrying that the effect of re-introducing a custody clause would be to penalise infant plaintiffs whose parents / guardians were negligent in failing to commence proceedings on their behalf.

⁷⁴ *Ibid* at paragraph 3.118.

8.58 The introduction of a 12-year ultimate limitation period has been conceived in the interests of certainty, finality and fairness to the defendant. The Commission acknowledges however that it has the potential to create unfairness in a small number of cases. On the one hand the Commission is mindful of the imperative to ensure fairness to the defendant and to minimise delays wherever possible, while on the other it is cognisant of ensuring that vulnerable persons such as minors and incapacitated adults are protected where such protection is necessary. The Commission does not seek to recommend any revision of the law which would have the effect of penalising those who are vulnerable in our society. With that in mind, the Commission is anxious to find a workable solution which would ensure that an appropriate level of protection would be available to the those who are deserving of it.

(ii) Potential Solutions

8.59 As the Commission observed in 2001, the Supreme Court decision in *O'Brien v Keogh*⁷⁵ was primarily centred on the difficulty that arises where it is the plaintiff's parent or guardian who is the potential defendant. In 2001, the Commission recommended that this difficulty could be avoided by providing that the limitation period could be postponed while the claimant is taking an action against his or her parent or guardian.⁷⁶ The Commission noted that section 5(2) of the Alberta *Limitations Act* provides for such a scenario.⁷⁷ That sub-section was introduced in 2002 after the Alberta Institute expressed its concerns about the situation where a parent or guardian allows a limitation period to expire without bringing a claim, to the serious prejudice of the infant.⁷⁸ Section 5 allows for the running of the limitation period against a minor plaintiff who is in the custody of a guardian in certain circumstances and subject to the approval of the Public Trustee, who makes inquiries into the guardian's ability and intention to act in the plaintiff's best interest. Section 5 provides, however, that in no circumstances will the limitation period run against a minor plaintiff where the guardian is the potential defendant or where the claim is based on conduct of a sexual nature, including but not limited to sexual assault.⁷⁹ A similar exclusionary provision is in force in Western Australia where the *Limitation of*

⁷⁵ *O'Brien v Keogh* [1972] IR 144.

⁷⁶ Law Reform Commission *Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraphs 7.27-7.30.

⁷⁷ SA 1996 cL-15.1 (came into force on 1st March, 1999).

⁷⁸ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at 292-293.

⁷⁹ Section 5(13), *Limitations Act* RSA 2000, c.L-12.

Actions Act 2005)⁸⁰ provides that no limitation period will run against a minor plaintiff who is without a guardian while the limitation period is running where the minor plaintiff is in a “close relationship”⁸¹ with the defendant or where it was unreasonable for the guardian not to commence the action on time. This is designed to ensure that the defendant is unable to avoid being sued by pressurising the plaintiff not to bring proceedings, or ensuring that the plaintiff does not have knowledge of the facts essential to the formation of a cause of action.⁸²

8.60 The Commission acknowledges that there is some merit in legislating for the situation where the infant plaintiff is in a familial or close personal relationship with the defendant. The Commission is, however, mindful that the proposed limitations regime is intended to be streamlined, simplified and of general application, and that it should have as few exceptional rules as possible. For that reason the Commission does not favour the introduction of a complex or elaborate system such as those in place in Alberta or Western Australia. The Commission also notes that no system of independent checks and balances such as that which is in place in Alberta is available in Ireland and there are no plans to put such infrastructure in place.

8.61 An alternative solution was proposed by the Law Commission for England and Wales in 2001. Having considered a number of options it recommended the introduction of a clause to the following effect:-

“[A]ny long-stop limitation period shall run but not so as to bar a claim before the claimant has reached the age of 21.”⁸³

8.62 The Commission acknowledges that the introduction of such a clause would allow a minor a reasonable chance to bring proceedings on reaching majority. Nonetheless the Commission considers that it runs the risk of over-protecting the great majority of infant plaintiffs who are in the custody of a parent or guardian who is capable of commencing proceedings promptly on

⁸⁰ Sections 30-34, *Limitation Act 2005* (WA), Act No. 19 of 2005.

⁸¹ Section 33 (3), *Limitation Act 2005* (WA), Act No. 19 of 2005 defines a “close relationship” so as to include persons who are in the long-term or day-to-day care, welfare and development of the plaintiff, or where the relationship is such that it is reasonable in the circumstances for the plaintiff not to commence proceedings or for the plaintiff not to wish to divulge the conduct or events in respect of which an action would be founded.

⁸² Explanatory Memo, *Limitation Bill 2005 (Clause Notes)*, clause 33.

⁸³ Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 3.120.

behalf of the plaintiff. It is also inconsistent with the Commission's goal of formulating a simplified limitations regime consisting of a minimum number of different limitation periods and rules governing their general application.

8.63 A further option would be to allow for a narrow, residual discretion on the part of the courts to allow for proceedings to be commenced in exceptional circumstances even where the plaintiff is statute-barred by reason of the expiry of the ultimate limitation period. This would in effect be a reverse of the courts' present inherent jurisdiction to dismiss for want of prosecution, and would be expressly subject to the interests of justice being served. Although the Commission does not consider that an exhaustive list of the situations in which "exceptional circumstances" arise would serve the purpose of allowing for a residual discretion, it is helpful to consider some examples. One might be where the infant plaintiff was not in the custody of a competent parent or guardian during the time allowed for proceedings to be commenced. Another might arise where the infant plaintiff's cause of action is against the parent or guardian in whose custody or guardianship he was during the time allowed for proceedings to be commenced. A further scenario might be where the plaintiff's parent or guardian was either negligent or unreasonable in failing to commence proceedings on behalf of the child before the limitation period expired. Alternatively the residual discretion could be exercised where it is shown on the balance of probabilities that the infant plaintiff and / or his parent or guardian was in a close familial or personal relationship with the defendant such that there was pressure – whether conscious or otherwise – to refrain from commencing of proceedings.

8.64 The Commission considers that the residual discretion could also be exercisable if the proposed new guardianship regime envisaged in the *draft Scheme of a Mental Capacity Bill 2008* does not result in a sufficient basis for an adult plaintiff who is deemed unable to manage his affairs to have a guardian appointed to him who is both willing and capable to institute or defend proceedings on his behalf.

8.65 *The Commission provisionally recommends the introduction of a residual discretion on the part of the courts, exercisable in exceptional cases and subject to the interests of justice, to allow proceedings to be commenced by a plaintiff who had not reached the age of 18 before the expiry of the ultimate limitation period.*

(c) Convicted prisoners

8.66 The Commission notes that the *Statute of Limitations 1957* provides that the running of the limitation period is postponed in respect of 'convicts' who are subject to operation of the *Forfeiture Act 1870*,⁸⁴ and in respect of whom no

⁸⁴ 33 & 34 Vic. c. 23.

administration or curator has been appointed.⁸⁵ Section 8 of the 1870 Act prevented persons “convicts”, those convicted of treason or felony and sentenced to death or penal servitude from bringing any action unless they are lawfully at large under licence or unless an administrator or curator of their property has been appointed.⁸⁶ The *Forfeiture Act 1870* was repealed by the *Criminal Law Act 1997*,⁸⁷ which abolished the concepts of felonies and misdemeanours. As a result, the reference to the 1870 Act in the *Statute of Limitations 1957* is obsolete. In 2001 the Commission recommended that section 48(1)(c) should be removed from the *Statute*⁸⁸ and the Commission reiterates that proposal here. Because a person who is imprisoned on conviction does not lose any rights, other than the right to liberty, the Commission provisionally recommends that a new limitations regime should not contain any provision for postponement where the plaintiff is a convicted prisoner.

8.67 *The Commission provisionally recommends that a new limitations regime should not contain any provision for postponement where the plaintiff is a convicted prisoner.*

C Acknowledgments or Part Payment by the defendant

8.68 Sections 50 to 60 of the *Statute of Limitations 1957* govern the impact of acknowledgements on the running of limitation periods while sections 61 to 70 govern the impact of part payments. The general rule is that even if a cause of action has already accrued, it will be deemed to have accrued afresh on the date of an acknowledgment or part payment by the defendant. Thus, the part payment or acknowledgment in effect restarts the running of the limitation period.⁸⁹ This will occur, however, only in respect of specified actions and subject to the formal requirements set out in the *Statute*.

⁸⁵ Section 48(1)(c), *Statute of Limitations 1957*.

⁸⁶ Dáil Debates, volume 154, March 1 1956, *Statute of Limitations Bill, 1954 - Second Stage*, at 1147.

⁸⁷ See section 16 and Schedule 3, *Criminal Law Act 1997* (No. 14 of 1997).

⁸⁸ See Law Reform Commission *Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (other than Personal Injury)* (LRC 64-2001) at paragraph 7.04.

⁸⁹ In *Busch v Stevens* [1963] 2 WLR 511, at 515, Lawton LJ described the principle as follows (referring to section 23 (4) of the English *Limitation Act 1939*):-“in the specific circumstances of an acknowledgment or payment the right [of action] shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth – and also like the phoenix, it is still itself.”

(1) Acknowledgments

8.69 For the most part, the *Statute of Limitations 1957* simply consolidated the law as to the effect of an acknowledgment in the different classes of case where it could arise when the *Statute* was drafted. The principles governing acknowledgment have their origins in the doctrine that a right of action upon a simple contract debt might be revived by acknowledgment, a doctrine that appears to have been a judicial creation.⁹⁰ The doctrine first received statutory recognition in the *Statute of Frauds Amendment Act 1828*⁹¹ which provided that only an acknowledgment in writing should take the action out of the *Statute*. An acknowledgment by an agent was rendered as effective as an acknowledgment made by his principal by the *Mercantile Law Amendment Act 1856*.⁹² Thereafter it was decided by case-law that an acknowledgment could only revive a debt if it contained a fresh promise to pay, whether express or implied. That principle applied until 1959 in relation to simple contract debts⁹³ but it does not apply under the *Statute of Limitations 1957*.

8.70 Section 23 of the *Common Law Procedure Amendment Act (Ireland) 1853*⁹⁴ provided that an action upon a specialty debt may be brought within twenty years after an acknowledgment has been made. There was no requirement of a fresh promise to pay in that context – just an admission that the debt was due. That principle applied in the case of actions to recover land or money charged thereon, under the *Real Property Limitation Acts*.⁹⁵ The principle was adopted in the *Statute of Limitations 1957* for all debts, doing away with the requirement to make a fresh promise to pay.

8.71 Under the current *Statute*, the acknowledgement by the defendant of a debt owed to the plaintiff may re-start the running of the limitation period. One reason behind this rule is that the purpose of limitations law is to prevent a stale claim progressing through the courts in the event as the lapse of time makes it difficult for the defendant to prove that a debt had not been incurred or had

⁹⁰ Dáil Debates, Vol. 154, *Statute of Limitations Bill, 1954 - Second Stage* (1 March, 1956) at 1149.

⁹¹ 9 Geo 4, c. 14 (“Lord Tenteden’s Act”).

⁹² 19 & 20 Vict, c. 97.

⁹³ Dáil Debates, Vol. 154, *Statute of Limitations Bill, 1954 - Second Stage* (1 March, 1956) at 1149.

⁹⁴ 16 & 17 Vic, c. 113.

⁹⁵ See *Real Property Limitation Act 1833* (3 & 4 Will. 4, c. 27); *Real Property Limitation Act 1837* (7 Will. 4 & 1 Vic, c. 28); *Real Property Limitation Act 1874* (37 & 38 Vic, c. 57).

been satisfied. The difficulty for the defendant - and the consequent need for the protection of limitations law - is greatly reduced where it can be shown that the defendant acknowledged the debt or made a part payment of it.⁹⁶ The acknowledgement is therefore seen to keep the action alive. There is an element of estoppel involved - it is thought that if the debtor has promised to pay a debt, the creditor should be permitted to rely on this new promise without bringing an action for a renewed limitation period.⁹⁷

8.72 The *Statute* does not define an “acknowledgment” but it sets out certain formal requirements which must be met in order for an acknowledgment to restart the limitation period - it must be made in writing and signed by the acknowledgor.⁹⁸ It may be made *by* the agent of the person by whom the acknowledgement is required to be made, and *to* the person or the agent of the person whose title, right, equity of redemption or claim is being acknowledged.⁹⁹ An acknowledgment made by or to a stranger is of no effect.¹⁰⁰ There is no requirement that the plaintiff show either an express or implied promise to pay; there must only be an acknowledgment of a debt or other liquidated amount.¹⁰¹ It is therefore sufficient for the defendant to have written to the plaintiff stating that he or she would never pay the said amount. One qualification is that the defendant must quantify the debt in figures or in such a way that the amount is ascertainable by calculation or by extrinsic evidence without further agreement by the parties. If the debt is not quantified or ascertainable without further agreement, the acknowledgment is insufficient for the purposes of the *Statute*.¹⁰²

⁹⁶ See Brady & Kerr *The Law of Limitations* (2nd ed 1994) at 50.

⁹⁷ Alberta Institute of Law Research and Reform *Limitations* (Report for Discussion No. 4, 1986) at 303.

⁹⁸ Section 58(1), *Statute of Limitations 1957*.

⁹⁹ *Ibid.*

¹⁰⁰ See *Millard v. McMahon* (Henchy J) 15 January 1968, cited in Brady & Kerr *The Law of Limitations* (2nd ed Law Society 1994) at 51.

¹⁰¹ *Good v Parry* [1963] 2 WLR 846, 849 (Lord Denning MR); applied in *Smith v Ireland* [1983] ILRM 300. In that case, Finlay P. held that a letter from the Minister for Agriculture and Fisheries to the plaintiffs acknowledging receipt of a request for payment and stating that a further letter would issue as soon as possible could not be construed as an acknowledgment of a debt owing to the plaintiff.

¹⁰² *Good v Parry* [1963] 2 WLR 846, 849 (Lord Denning MR); applied in *Smith v Ireland* [1983] ILRM 300.

8.73 The current rules governing acknowledgments apply only to certain actions - actions to recover land (section 51 of the *Statute*); actions by mortgagees to recover land (section 52); actions by mortgagees claiming sale of land (section 53); actions by mortgagors to redeem land (section 54); actions in respect of private rights in or over land (section 55); actions to recover debt (section 56); actions to recover mortgage debt (section 56(2)) and actions claiming a share or interest in the personal estate of a deceased person (section 57).

(2) Part Payments

8.74 A part payment is a form of acknowledgment where the right of action is in respect of a debt and the acknowledgment takes the form of conduct rather than words. The law is more or less the same as that of acknowledgment.¹⁰³ The payment may be made *by* the agent of a person liable and *to* the agent of the person in respect of whose claim the payment is being made.¹⁰⁴ There is no requirement of an express or implied promise to pay. No endorsement or memorandum of any payment written upon any bill of exchange or promissory note on behalf of the party to whom such payment is made will be considered to be evidence of a part payment for the purposes of the *Statute*.¹⁰⁵ Specific rules govern the appropriation of a part payment where a number of debts exist.¹⁰⁶

8.75 The current rules applicable to part payments apply only to certain actions - actions by mortgagees to recover land (section 62); actions by mortgagees claiming sale of land (section 63); actions by mortgagors to redeem land (section 64); actions to recover debt (section 65); and actions claiming a share or interest in the personal estate of a deceased person (section 66).

¹⁰³ Dáil Debates, Vol. 154, *Statute of Limitations Bill, 1954 - Second Stage* (01 March, 1956) at 1151.

¹⁰⁴ Section 67, *Statute of Limitations 1957*.

¹⁰⁵ Section 70, *Statute of Limitations 1957*. This rule applied prior to the enactment of the *Statute* – see Dáil Debates, Vol. 154, *Statute of Limitations Bill, 1954 - Second Stage* (01 March, 1956) at 1152.

¹⁰⁶ Section 69, *Statute of Limitations 1957*. These rules apply where the debt is not appropriated to a particular debt. If some or all of the debts are *not* statute-barred, the payment will be deemed to be appropriate *pari passus* in respect of the debts which are *not* statute-barred, unless the circumstances in which the payment was paid indicate otherwise. If, however, all of the debts are statute-barred, the payment will be deemed to be appropriated *pari passus* in respect of each of the debts, unless the circumstances in which the payment was paid indicate otherwise.

(3) A new limitations regime – is there a continued need for the rules governing acknowledgment and part payment?

8.76 The Commission acknowledges that the rules governing acknowledgments and part payments have long been a feature of limitations law. It is considered, however, that the introduction of a general discoverability / date of knowledge test for the running of the basic limitation period will render it unnecessary for limitations law to provide additional protection to the plaintiff in the event of an acknowledgment or part payment by the defendant after the expiry of the basic or ultimate limitation periods. The date of knowledge or discoverability is premised on the theory that the plaintiff has all of the knowledge required on a particular date to bring proceedings and that as a result the plaintiff should be required to bring proceedings within a set period after that date. It is clear that if an acknowledgment or part payment occurs, this will go some way towards establishing that the plaintiff has the requisite knowledge to commence proceedings, if he or she did not already have that knowledge. It would be somewhat illogical to suggest that the date of knowledge of the plaintiff should somehow re-occur at a date after the requisite conditions are fulfilled, simply by reason of the defendant's acknowledgment of his liability or by his part payment in respect of that liability. It may also have the undesirable effect of penalising any attempt on the part of the defendant to achieve an out-of-court solution after the plaintiff's date of knowledge but before proceedings are commenced.

8.77 The Commission is of the view that the law of limitations should provide real incentives for proceedings to be brought as promptly as is possible, in the interests of justice, certainty and fairness. The current provisions allowing for the running of the limitation period to begin anew in the event of an acknowledgment or a part payment detract from this important goal. To incorporate such provisions into a new regime would be contrary to the spirit of ensuring maximum clarity and consistency in the application of limitations law.

8.78 *The Commission provisionally recommends that an acknowledgment or part payment should have no impact on the running of either the basic or ultimate limitation period.*

D Fraud and Fraudulent Concealment

8.79 Under section 71 of the *Statute of Limitations 1957*, a limitation period will not begin to run against a defendant if:-

“(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person.”

8.80 The limitation period begins to run only when the plaintiff “has discovered the fraud or could with reasonable diligence have discovered it.”¹⁰⁷

8.81 Section 71(1)(b) has its origins in equitable principles which were, it appears, first laid down in section 26 of the *Real Property Limitation Act 1833*¹⁰⁸ as follows:-

“That in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered”.

8.82 Section 26 ameliorated the rigour of the 20-year limitation period set out in the Act for persons claiming land or rent in equity.¹⁰⁹ The “previously well-settled principles of equity” set out in section 26 of the 1833 Act were interpreted as being applicable “to all kinds of property, and not to real property only”,¹¹⁰ although doubts have been expressed about whether that interpretation was entirely correct.¹¹¹ The rationale behind the rules governing fraudulent concealment been expressed as follows:-

“The equitable exception to the old and unqualified statutory limitation rule rested on the principle that a defendant whose unconscionable conduct had denied the plaintiff the opportunity to sue in time should not in conscience be permitted to plead the statute to defeat the plaintiff’s claim provided the claim were brought timeously once the plaintiff learned or should have learned of it.”¹¹²

¹⁰⁷ Section 71(1), *Statute of Limitations 1957*.

¹⁰⁸ 3 & 4 Will. 4, c. 27. See further *Willis v Earl Howe* [1893] 2 Ch. 545. Section 26 is said to have been framed in accordance with the recommendations of the Real Property Commissioners and to have been intended to confirm the existing rules of equity as to the effect of fraud upon the operation of the statutes of limitations. See Dr. E.P. Hewitt *Treatise on the Statutes of Limitations* (1893) at 206, cited in *Sheldon v R.H.M. Outhwaite (U/W) Ltd* [1994] 3 WLR 999 (CA).

¹⁰⁹ *Sheldon v R.H.M. Outhwaite (U/W) Ltd & Ors* [1994] 3 WLR 999 (CA).

¹¹⁰ *Thorne v Heard* [1894] 1 Ch. 599, 605 (Lindley J.)

¹¹¹ See *Sheldon v R.H.M. Outhwaite (U/W) Ltd & Ors* [1994] 3 WLR 999 (CA), which in turn cites *Betjemann v Betjemann* [1895] 2 Ch. 474, 479 (Lindley J.).

¹¹² *Sheldon v R.H.M. Outhwaite (U/W) Ltd & Ors* [1994] 3 WLR 999 (CA).

8.83 It should, however, be noted that later judgments suggest that unconscionable behaviour is not a prerequisite to establishing fraudulent or deliberate concealment.¹¹³

(1) A new limitations regime - is there a continued need for postponement in the event of fraud or fraudulent concealment?

8.84 The principle underpinning section 71 of the *Statute* is that a limitation period should generally not run against a plaintiff at that time when he or she is not aware of the existence of his right of action. It is clear that this is the same principle that underlies the discoverability / date of knowledge test.

8.85 The Commission observed in 2001 that the introduction of a discoverability test would “swallow up and make redundant” section 71 of the *Statute* given that it essentially applies a discoverability test. The introduction of a discoverability test would therefore render that section somewhat unnecessary.¹¹⁴ The Commission did not recommend the abolition of the principle, however, as it was concerned that the date of discoverability of an action an action that has been fraudulently concealed from the plaintiff might not always coincide with the date of discoverability of the resulting loss. Fraudulent concealment is linked to the plaintiff’s state of mind, which of course determines the date of knowledge it is possible that a plaintiff might discover the loss on a particular date and later discover the defendant’s fraud or fraudulent concealment.¹¹⁵ For this reason, the Commission in 2001 recommended the retention of a provision equivalent to section 71 alongside the proposed discoverability rule.¹¹⁶

8.86 In the context of proposals for a simplified limitations regime, however, the Commission has reconsidered its view. The Commission considers that if the date of knowledge / discoverability test is carefully formulated, it will require a plaintiff to bring proceedings only where the requisite knowledge to do so. Where the plaintiff is deemed to have the requisite knowledge, it is immaterial that the defendant sought to fraudulently conceal the cause of action from her, whether successfully or otherwise. Where the date of knowledge is defined by reference to the plaintiff’s constructive knowledge - i.e. what ought she have known at the relevant time - any attempt to conceal the cause of action on the

¹¹³ See *Cave v Robinson Jarvis and Rolf* [2003] 2 WLR 1107, 1123 (HL).

¹¹⁴ Law Reform Commission *Report on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64-2001) at paragraph 7.41.

¹¹⁵ *Ibid* at paragraph 7.42.

¹¹⁶ *Ibid* at paragraph 7.42.

part of the defendant will, of course, be an element to be weighed in the balance. The fact that the plaintiff did not make any inquiries which might otherwise have been expected of her may or may not be outweighed by the defendant's attempts to conceal the cause of action from her. This can only be determined on a case by case analysis, depending on the nature and degree of success of the defendant's conduct and the various other sources from which the plaintiff might have been expected to uncover the requisite knowledge had she sought it out.

8.87 The Commission therefore considers that the introduction of a general discoverability / date of knowledge test will render obsolete the continued need for a provision such as section 71 of the *Statute*.

8.88 *The Commission provisionally recommends that the concept of postponement in circumstances where the action is based on the fraud of the defendant or the defendant has fraudulently concealed the cause of action from the plaintiff should not be incorporated into a new limitations regime which includes a discoverability test of general application.*

E Actions seeking relief from the consequences of Mistake

8.89 Section 72 of the *Statute of Limitations 1957* provides a limited defence of mistake which suspends the running of the limitation period until such time as the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.¹¹⁷ The defence is very limited as it applies only where the basis of the plaintiff's action is relief "*from the consequences of mistake*". Thus, the mistake must be part of the cause of action.¹¹⁸ An example of such an action would be a claim for rectification of a deed or of the register in the case of registered title, or an action to recover money paid under a mistake of fact. In *Kearns & Fallon v McCann Fitzgerald*, Peart J. gave the example of a contract entered into as a result of a mistake and where the action is seeking relief by way of rescission or rectification.¹¹⁹ The English Court of Appeal has held, when interpreting section 32(1)(c) of the *Limitation Act 1980*, a provision equivalent to section 72 of the *Statute*, that an action is one for relief from the consequences of a mistake where the mistake is an essential

¹¹⁷ Section 72(1), *Statute of Limitations 1957*.

¹¹⁸ Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 196-7, citing *Trewin v Flower* [1965] NZLR 8.

¹¹⁹ [2008] IEHC 85.

ingredient of the cause of action.¹²⁰ The test of reasonable diligence implies that time will still run against the plaintiff if he or she could have discovered the mistake with such diligence, whether or not the mistake was due to his or her fault or that of the defendant.¹²¹ The defence is not available to plaintiffs who are mistaken as to or simply ignorant of their rights¹²² - a person may acquire adverse title to land because, for example, of his neighbour's mistake as to the location of the boundary between the two properties.¹²³

(1) A new limitations regime - is there a continued need for postponement in the event of mistake?

8.90 In the light of the proposed introduction of a general date of knowledge test, the Commission is of the view that there is no continued need for a limitation defence of mistake. Section 72 provides that time starts only from the date on which the plaintiff discovers the mistake from the consequences of which he is claiming relief, or with reasonable diligence could have discovered the mistake. The introduction of a general date of knowledge test would mean that the protection provided by section 72 would be automatically incorporated into the general limitations regime.¹²⁴ Section 72 would therefore become obsolete.

8.91 *The Commission provisionally recommends that the defence of mistake should not be incorporated into a core limitations regime which includes a discoverability test of general application.*

¹²⁰ *Malkin v Birmingham City Council* (Court of Appeal) 12 January 2000 cited in Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at paragraph 2.89.

¹²¹ Lyall *Land Law in Ireland* (2nd ed Round Hall: Sweet & Maxwell 2000) at 894.

¹²² See *Phillips-Higgins v Harper* [1954] 1 QB 411, 418 (Pearson J).

¹²³ Brady and Kerr *The Limitation of Actions* (2nd ed 1994) at 196, citing *Re Vernon's Estate* [1901] 1 I.R. 1.

¹²⁴ See also Law Commission for England and Wales *Limitation of Actions* (Report No. 270, 2001) at 49, fn 21; New Zealand Law Commission *Tidying the Limitation Act* (NZLC R 61, July 2000) at paragraph 23.

CHAPTER 9 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The provisional recommendations made in this Consultation Paper may be summarised as follows:

9.01 The Commission provisionally recommends that the law governing limitation of actions must ensure that, in resolving civil disputes in an orderly and timely fashion, it takes into account the competing rights of plaintiffs and defendants as well as the general interest of the public, within the framework of the Constitution and the European Convention on Human Rights. [Paragraph 1.128.]

9.02 The Commission provisionally recommends that, in the context of a reformed law on limitation of actions, it should be clear that specific forms of civil litigation, such as claims for breach of a fiduciary duty, do not fall within the scope of any limitation period in the limitations legislation. [Paragraph 2.93]

9.03 The Commission provisionally recommends that, since the principal legislation governing limitation of actions, the Statute of Limitations 1957 (as amended) is unnecessarily complex, it is in need of fundamental reform and simplification. [Paragraph 2.264.]

9.04 The Commission provisionally recommends the introduction of new “core regime” legislation governing limitation of actions, based on a set of limitation periods that would apply to various civil actions and which would remedy a number of anomalies in the current law. The Commission also provisionally recommends that the new legislation governing limitation of actions should apply to the majority of civil actions, with limited exceptions which would provide for special limitation periods. [Paragraph 3.65.]

9.05 The Commission provisionally recommends the introduction of a uniform basic limitation period of general application, which would apply to a wide range of civil actions, subject to a limited number of exceptions. [Paragraph 4.13.]

9.06 The Commission provisionally recommends the introduction of either:

- (a) one basic limitation period of general application, running for a period of two years; or

(b) three basic limitation periods of specific application, running from periods of one, two and six years respectively. [Paragraph 4.53.]

9.07 The Commission provisionally recommends that, subject to rules concerning the date from which the basic limitation period is to run, the introduction of a two-year limitation period would be sufficient for the majority of actions. [Paragraph 4.54.]

9.08 The Commission provisionally recommends the basic limitation period should run from the date of knowledge of the plaintiff [Paragraph 4.160.]

9.09 The Commission provisionally recommends the introduction of an ultimate limitation period of general application [Paragraph 5.16.]

9.10 The Commission provisionally recommends the introduction of an ultimate limitation period of general application of 12 years' duration. [Paragraph 5.56.]

9.11 The Commission provisionally recommends that the ultimate limitation period should run from the date of the act or omission giving rise to the cause of action. [Paragraph 5.109.]

9.12 The Commission provisionally recommends that the ultimate limitation period should apply to personal injuries actions [Paragraph 5.126.]

9.13 The Commission provisionally recommends that if the proposed new legislation governing limitation of actions contains a short basic limitation period and a longer ultimate limitation period, supplemented by rules governing postponement, it need not include a provision allowing for judicial discretion to either extend or dis-apply the limitation period [Paragraph 6.116.]

9.14 The Commission provisionally recommends that the proposed new legislation governing limitation of actions should include an express statement that, without prejudice to the provisions of the legislation, the courts may continue to exercise their inherent jurisdiction to dismiss a claim for prejudicial delay/ want of prosecution. [Paragraph 7.60.]

9.15 The Commission provisionally recommends that the term 'disability' should not form part of a revised, modern limitations regime [Paragraph 8.15.]

9.16 The Commission provisionally recommends that, in light of the proposal in the Government's Scheme of a Mental Capacity Bill 2008 to establish a new guardianship system for adults whose mental capacity is limited or who lack mental capacity, the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is an adult whose mental capacity is limited or who lacks mental capacity [Paragraph 8.45.]

9.17 The Commission provisionally recommends that the proposed limitations regime should not allow for any exception to the running of either the basic or the ultimate limitation period in the event that the plaintiff is a under the age of 18 and is in the custody of a competent parent or guardian who is conscious of his or her responsibilities and is capable of commencing proceedings on behalf of the plaintiff [Paragraph 8.52.]

9.18 The Commission provisionally recommends the introduction of a residual discretion on the part of the courts, exercisable in exceptional cases and subject to the interests of justice, to allow proceedings to be commenced by a plaintiff who had not reached the age of 18 before the expiry of the ultimate limitation period [Paragraph 8.65.]

9.19 The Commission provisionally recommends that a new limitations regime should not contain any provision for postponement where the plaintiff is a convicted prisoner [Paragraph 8.67.]

9.20 The Commission provisionally recommends that an acknowledgment or part payment should have no impact on the running of either the basic or ultimate limitation period [Paragraph 8.78.]

9.21 The Commission provisionally recommends that the concept of postponement in circumstances where the action is based on the fraud of the defendant or the defendant has fraudulently concealed the cause of action from the plaintiff should not be incorporated into a new limitations regime which includes a discoverability test of general application [Paragraph 8.88.]

9.22 The Commission provisionally recommends that the defence of mistake should not be incorporated into a core limitations regime which includes a discoverability test of general application [Paragraph 8.91.]



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This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

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